

James Burrow
R E P O R T S

O F

C A S E S .

ARGUED AND ADJUDGED

In the Court of King's Bench,

DURING THE TIME OF

Lord MANSFIELD's presiding in that Court,

FROM

**MICHAELMAS TERM 30 GEO. II. 1756, to
EASTER TERM 12 GEO. III. 1772.**

IN FIVE VOLUMES.

By Sir JAMES BURROW, Knt.

**Late MASTER of the CROWN OFFICE, and one of the BENCHERS
of the Honourable Society of the INNER TEMPLE.**

The THIRD EDITION, Corrected;

**With the ADDITION of MARGINAL NOTES, and REFERENCES
to the other Reports of the same Cases.**

V O L. III.

**From MICHAELMAS TERM 2 GEO. III. 1761, to TRINITY TERM
6 GEO. III, 1766, inclusive.**

L O N D O N :

**PRINTED BY A. STRAHAN AND W. WOODFALL,
LAW-PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY;
FOR E. AND R. BROOKE IN BELL-YARD, NEAR TEMPLE-BAR.**

MDCCXC.

THE
OF
CASES

ARGUED AND ADJUDGED

In the Court of King's Bench

during the time of

Lord Mansfield's sitting in that Court

1750.

MICHAELMAS TERM 30 GEO. II. 1750. to
EASTER TERM 12 GEO. III. 1752.

IN THE COURT OF KING'S BENCH



BY SIR JAMES BURROW, Knt.

late Master of the Crown Office, and one of the Benchers
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VOL. III.

From MICHAELMAS TERM 30 GEO. II. 1750. to TRINITY TERM
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FOR R. AND J. IN ONE IN BELL-YARD, NEAR TRINITY-LANE.

MDCCL.

A

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Michaelmas Term

2 Geo. 3. B. R. 1761.

Sulston *versus* Norton.

THIS was an action on the statute of 2 G. 2. c. 24. § 7. "For the more effectual preventing bribery and corruption in the election of members to serve in parliament."

The declaration contained five counts: first, that the defendant corrupted one *Moore* to vote for Lord *Villiers* and Sir *Robert Burdett*, by giving him five pounds five shillings; secondly, a corrupt agreement to give *Moore* five pounds five shillings; thirdly, a corrupt agreement to lend him five pounds five shillings upon a promissory note; fourthly, a corrupt agreement to deliver the note to *Moore* on voting; fifthly, for giving the note and counter-note hereafter mentioned. A verdict was found for the plaintiff, and entered on the first count.

Mr. Serjeant *Hewitt*, on behalf of the plaintiff, shewed cause against setting aside the verdict; which had been moved for, on the part of the defendant.

Mr. *Caldecott*, on behalf of the defendant, had objected, when he made that motion,

First, that the man *did not in fact* vote for the persons he promised to vote for; but, on the contrary, voted for their *opponents*: and therefore the defendant, as he did not by any corrupt agreement procure *Moore* to vote for them, cannot be said to have corrupted him to do so.

Secondly, that the verdict ought not to have been taken on the first count, which was for giving him the money.

(1 Black. Rep.
317. S. C.)

Monday, 16
Nov. 1761.

Action for parliamentary bribery will lie tho' the party bribed does not vote according to the bribe.

1761.

SULISTON
V.
NORTON.

To the first objection, the case of *Bush v. Rawlins* in B. R. P. and Tr. 29 G. 2. was said, by the Serjeant, to be a full answer, being in point.

And in answer to the second objection, he alledged that the evidence given very sufficiently supported the taking the verdict on the first count; and for the truth of his allegation, appealed to Mr. Justice *Foster*, who tried the cause.

Mr. Justice *Foster* reported the evidence to have been, "That the defendant gave *Moore* five guineas, to vote for Lord *Villiers* and Sir *Robert Burdett*; that *Moore* gave him a note for it; and the defendant gave him a counter-note, obliging himself to give up the former note, when the condition should be performed."

Mr. *Caldecott* and Mr. *Thurlow*, for the defendant thereupon observed, that the act of parliament says, "If any person, &c. shall take any money, &c. by way of gift, loan, or other devise:" and though the plaintiff has laid this several ways, he has taken a verdict as upon a GIFT; whereas it appears in fact, *not* to have been a gift, but a loan or other device.

In order to entitle them to take a verdict on the first count, they must have proved it to be a gift: which it appears by the judge's report, they could not prove.

The statute expressly distinguishes between *gifts* and loans or other devices. And so indeed does their own declaration: For, the first count is founded upon the former; the four others, on the latter.

This action being upon a penal statute, it therefore ought to be taken strictly.

This case, as it is laid, differs from that of *Bush v. Rawlins*: the resolution there does * not interfere with this. For here, "corrupting *Moore* to give his vote" must mean actually "procuring him to give his vote:" whereas the man did *not* vote so; and consequently, the other candidate (Mr. *Luttrell*) was not hurt, at all, by what the defendant did.

* That resolution was, "That the giving a bribe to forbear voting at the election of a member to parliament was an offence, within this same act and clause, *although* the man did *not* forbear to vote, but actually voted for the opponent's candidate;" and "that there was no need for the plaintiff to alledge in his declaration, that the man did actually give, or forbear his vote according to his promise."

Lord

Lord Mansfield,—The first objection is in the nature of a motion for a new trial on account of a mis-direction by the judge.

1761.

SULLSTON

NORTON

But the case of *Busb v. Rawlins* is in point. And I wonder how it could ever be a doubt: for, the offence was *completely* committed by the corrupter; whether the other party shall afterwards perform his promise, or break it.

Secondly, as to the verdict's being taken on a wrong count—the evidence *does* support the first count. For this is a *GIFT*: the note and all the rest is mere *evasion, colour, disguise*, and *device* to evade the law.

But *if* it were not so, the verdict was given generally for the plaintiff. If, by mistake, it has been entered upon a count not proved, instead of the count which was proved, *that* is no reason for a new trial: the blunder has not injured the defendant. The Court ought rather to rectify the mistake, by ordering the verdict to be entered upon the right count, agreeable to the evidence, and consequently the *true* ground upon which the jury found for the plaintiff.

However, the *gift* is the *true* and proper count to take it upon: if it was really a *loan*, it would be *no* corruption.

Mr. Justice Wilmot held accordingly. This is the right and true count to take the verdict upon.

Per Cur.

RULE DISCHARGED.

Stevenson *versus* Snow.

THIS was a special case reserved at a trial at *Nisi prius* before Lord Mansfield in London, upon an action for money had and received to the plaintiff's use, brought by the plaintiff the insured, against the defendant the insurer, for a return of part of the premium.

Case—It was an insurance upon a ship, at five guineas *per cent.* lost or not lost, at and from London to *Hallifax* in *Nova Scotia*, warranted to depart *with convey* from *Portsmouth* for the voyage, that is to say, the *Hallifax* or *Louisbourg* convey.

B 2

(1 Black. Rep.
315. S. C.)Tuesday 17
Nov. 1761.If a risk is not
run, insurer shall
retain only a
proportionable
part of the pre-
mium.

Before

1751.

STEVENSON

V.

SNOW.

Before the ship arrived at *Portsmouth*, the *convoy* was GONE. Notice of this was immediately given by the insured to the underwriter: and at the same time, he was also desired either to make the long insurance, or to return part of the premium.

The jury find that the usual settled premium from *London* to *Portsmouth* is one and one-half *per cent*.

They find also that it is *usual* for the under-writer, in such like cases, to return *part* of the premium; but the *quantum* is uncertain: (and the quantum must in its nature be uncertain; because it depends upon uncertain circumstances.)

It is stated that the plaintiff made to the defendant an offer of allowing him to retain one and one-half *per cent*. for the risque he had run on such part of the voyage as was performed under the policy, *viz.* from *London* to *Portsmouth*.

Mr. *Yates* was counsel for the plaintiff; and argued that as the defendant had *not*, by reason of this accident, run the whole intended risque, he ought not to keep *all* the premium; but ought to return so much as is proportionable to the latter part of the voyage insured, namely from *Portsmouth* to *Hallifax*; on which part of the voyage he has run no risque at all. The plaintiff has offered to let him retain so much as belongs to the former part of the voyage, *viz.* from *London* to *Portsmouth*; in which, he did run a risque: and the premium for that part of the voyage is at a settled known price.

Mr. *Wedderburn*, contra, for the defendant, endeavoured to maintain that the defendant was entitled to keep the *whole* premium.

The consideration was a *valuable consideration*, a stipulated price agreed upon by the parties for the *whole* voyage: and the voyage, was accordingly entred upon; and *part* of the *risque* was *actually* run by the defendant.

This contract was *entire*, and can not be apportioned by any court whatsoever. The premium must have been originally settled, upon computing the different risques of different parts of the voyage, all *blended together*. One part of the voyage is often much more dangerous than another: it might be the case of *this* voyage.

But

But even taking it *more largely*, as a contract *jure gentium*; and not confined to the strict common law notion of entirety of contract;—the *premium* is a matter *stricti juris*: the insurer was honestly and truly intitled to the premium, as soon as ever the *risque* was *begun*.

1761.
STEVENS
V.
SNOW

The *object* of the insurance, *viz.* the *voyage*, is also a matter *stricti juris*. The insured can not substitute *another* voyage in its place; though it should be a shorter and easier one. If, the ship had been lost *between London and Portsmouth* the insurer would have been liable to pay the whole. If the ship had made a *deviation*, or *returned* after she had left *Portsmouth* and was under convoy to *Hallifax*, the insurer would certainly and without dispute have been intitled to the *whole* premium, notwithstanding that *part* of the *risque* was not run at all. And so it is now, as the voyage was entered upon, and his *risque* once *begun*.

Mr. Yates, in reply. The *entirety of contract* is no reason in the present case. For this voyage is, in its nature, *divisible*: the voyage from *London to Portsmouth* is a distinct voyage from the voyage from *Portsmouth to Hallifax*.

The departing *with convoy* is the *condition* of the insurance.

If the ship had been lost *between London and Portsmouth*, the insurer must indeed have paid the loss: but the thirty shillings *per cent.* for *that part* of the whole voyage insured, would have been the consideration of it, and a full consideration for it.

Here, a *part of the consideration fails*, without the default of the party insuring. If the *risque* be not run, the insurer, in common justice, is not intitled to the premium for insuring it.

There are two ordinances, (one, of *Königsberg*, and the other, of *Stockholm*) which direct a return of the premium to be made, in cases where the policy does not operate, retaining only a small proportion of it (*half per cent.*) for the trouble of having made the insurance. They are in *Magens on Insurances*; vol. 2. pa. 190. N^o. 785. of *Königsberg*; vol. 1. pa. 266. N^o. 1070, 1071. of the city of *Stockholm*.

And this is a right and reasonable rule. We only desire a return of the premium for that part of the voyage where no *risque* at all has been run.

1761.

STEVENSON

Y.

SNOW.

Lord Mansfield, having first stated the case, said—I had not at the trial, nor have now, the least doubt about this question, myself,

These contracts are to be taken with great latitude; the strict letter of the contract is not to be so much regarded, as the object and intention of it.

Equity *implies* a condition “That the insurer shall not receive the price of running a risque, if he runs none.”

This is contract WITHOUT *any consideration*, as to the voyage from *Portsmouth to Halifax*: for he intended to insure *that* part of the voyage as well as the former part of it; and HAS NOT. Consequently, the insured received no consideration for *this* proportion of his premium. And then this case is within the general principle of actions for monies had and received to the plaintiff’s use,

I do not go upon the *usage*: for the usage found is only “That in like cases, it is *usual* to return a *part* of the premium; without ascertaining *what* part.”

If the risque is NOT RUN, though it is by the *neglect* or even the *fault* of the party insuring, yet the insurer shall *not retain* the premium.

It has been objected, “That the voyage being *begun*, and “*part of the risque* being already run, the premium can not be “apportioned.” But I can see no force in this objection. This is *not* a contract so entire that there can be no apportionment. For there are two parts in this contract; and the *premium* may be *divided* into two distinct parts, relative, as it were, to two voyages.

The practice shews, “That it has been *usual*, in such like “cases, to return a part of the premium;” though the *quantum* be not ascertained. And indeed the *quantum* must vary, as circumstances vary: so that it never can have been fixed with any precise exactness,

But though the *quantum* has not been ascertained; yet the *principle* is agreeable to the general sense of mankind.

Mr. Justice Denison was of the same opinion,

It

It is most equitable, that the defendant should only retain the premium for *such part* of the voyage as he has run the risque of. The insured has a right to have the other part restored to him. And this is agreeable to the general principle of actions for money had and received to the plaintiff's use: where the defendant had no right to retain it, he must refund it.

1761.

STEVENSON
v.
SNOW.

Mr. Justice *Foster* declared himself to be of the same opinion. There is *no consideration* for the remainder of the premium; for the voyage from *Portsmouth* to *Hallifax*, wherein no risque was run by the insurer, who only insured the voyage *with* convoy: therefore he has no right to retain the premium for *this*.

Mr. Justice *Wilmut* declared his concurrence most clearly and strongly. He said these kinds of contracts are by the writers on this head, called *contractus innominati*: and the rule which they lay down concerning them is, "That they are to be determined *secundum bonum et equum*."

The jury have here found *usage* "to return part of the premium, in such cases:" which is a strong proof of the equity of the thing. And nothing can be more just and reasonable.

If the risque was once *begun*, the insured shall not deviate or return back, and then say "I will go no farther under this contract, but will have my premium returned."

But upon *this* policy, there are *two distinct* points of time, in effect two voyages, which were clearly in the contemplation of the parties; and *only one* of the two voyages was made; the *other*, not at all entered upon. It was a *conditional* contract; and the second voyage was not begun. Therefore the premium must be returned: for upon this second part of the voyage, the *risque never took place* at all.

This is agreeable to what the writers on this subject lay down; and is the right and justice of the case.

Per Cur. unanimously—

Let the *posse* be delivered to the plaintiff.

Morris v. Pugh and Harwood.

MR *Morton* shewed cause on behalf of the plaintiff, against a new trial; for which Mr. *Norton*, who was for the de-

(1 Black, Rep.
342. 320. S.C.)
Thursday, 19
Nov. 1761.

Proof of a writ actually sued out, on a subsequent day, may be admitted to obviate the fictitious relation of a declaration to the first day of term.

1761.

MORRIS

PUGH and
Another.

endants, had, a few days ago, moved; because (as Mr. Norton said) the evidence of the writ ought not to have been admitted.

It was an action of trover, for a mare. No actual conversion was proved: but the evidence of conversion was a demand and refusal, on the second of May.

It was objected at the trial, "That this demand and refusal appeared to be *subsequent* to the bringing of the action:" for it appeared on the *Nisi prius* roll, that the bill was filed of Easter term; and consequently, as there was no special memorandum, it must refer to the first day of that term, which was in the beginning of April, (long before the time of the demand and refusal upon the second of May.) And there was no other evidence but this, to support the declaration.

In answer to this objection, the counsel for the plaintiff produced the writ; which appeared to be sued out AFTER the second of May.

The counsel for the defendants objecting to this evidence, as not admissible.

Lord Mansfield reserved the point, for the opinion of the Court: and if the Court should be of opinion "That it was *admissible*," then the verdict (which was found for the plaintiff) was to stand; otherwise the plaintiff to be non-suited.

Mr. Morton on behalf of the plaintiff, said they had a right to produce the writ, in answer to this objection: and the evidence arising from it was sufficient to intitle the plaintiff to a verdict.

The relation to the first day of the term is only a *fiction*: the fact was in this case quite otherwise.

When they grounded their objections upon this fiction, we shewed that IN FACT, the writ was sued out *subsequent* to the demand.

Therefore this evidence of the real fact answers the fictitious relation of the declaration to the first day of the term; though there be no special memorandum: for, the bill could not, in the course of practice, be filed before the writ was sued out; and the suing out of the writ is a matter in *Paijs*.

Mr. Norton contra.—They are concluded by what appears upon the record. The bill is the first process upon the title and the writ

writ can not be shewn in *contradiction* to it : for, this would be a contradiction to the record.

1761.

MORRIS
v.
PUGH and
Another.

LORD MANSFIELD—Refusal upon demand is not an actual conversion, but *evidence* of it. If the refusal on the second of *May* had really been after the action brought, I ought to have left it to the jury, as evidence of a conversion before the bringing of the action. But I had no doubt of admitting the writ, to shew “That the refusal “ was before the commencement of this suit.”

It is true, if there be no special memorandum, the bill, by fiction of law, relates to the first day of the term. But fictions of law hold only in respect of the *ends and purposes for which they were invented*; when they are urged to an intent and purpose *not* within the reason and policy of the fiction, the other party may shew the truth.

The BILL is *not* the commencement of the suit; the writ is : and being after the time to which the bill relates, shews that there should have been a special memorandum.

Judges ought to lean against every attempt to nonsuit a plaintiff upon objections which have no relation to the real merits : much more, when the plaintiff is clearly intitled to recover upon the merits, and must recover in another action.

It is unconscionable in a defendant, to take advantage of the *apices litigandi*, to turn a plaintiff round, and make him pay costs where his demand is just. Against *such* objections every possible presumption ought to be made, which ingenuity can suggest. How disgraceful then would it be to the administration of justice, to allow *chicanery* to obstruct *right*, by the help of a legal fiction contrary to the truth of the fact !

I am clearly of opinion “That the right was *rightly* admitted “ to be given in evidence.”

It has been determined, in actions upon *penal* statutes, which must be brought within a limited time, “That the plaintiff “ may shew the true commencement of the prosecution, *contrary* to the fiction”: and this being done in support of a *penal* action, is much stronger than the present case; where truth is admitted, to prevent manifest injury and wrong.

Therefore the rule ought to be discharged,

Mr.

1761.

MORRIS

PUGH and
Another.

* There were
two: one, for
words; the
other, for an
assault and bat-
tery.

Mr. Justice *Denison* concurred; and mentioned a * case in Lord *Hardwicke's* time, where his lordship would *not* nonsuit the plaintiff upon the general memorandum upon the record; because it was *amendable*.

This indeed, in the present case, was upon *evidence*; that, in Lord *Hardwicke's* time, was upon *record*: but there is no difference in reason,

Mr. Justice *Wilmot* concurred: and he said he did not, nor ever could understand what was meant by "the *bill's* being the *FIRST PROCESS*"; for there must have been some *other* process prior to the filing the bill.

The writ is that *first* process, and *may be shewn*; and the practice is so; and it is right and reasonable that it should be so.

Lord *Mansfield*—*This too was amendable*, in the present case,

Mr. Justice *Wilmot*—There was a rule made about amending it; but I am very glad they have not proceeded upon that rule; because it has afforded an opportunity of settling the point.

The RULE to shew cause "Why the verdict should not be set aside, and a new trial had," was DISCHARGED.

(1 Black. Rep.
345. S. C.)
Friday, 20
Nov. 1761.

A void deed of
covenant to
stand seised to
uses, being un-
sealed, shall
not operate as
a will, nor as a
revocation of a
former will.

Wright, ex dimiss' William Clymer *versus*
Littler et al'.

THIS was an ejectment for certain copyhold lands within the manor of *Barnes* in the county of *Surrey*; in which manor, there is a custom of *Burrough-Englisb*.

The lessor of the plaintiff, *William Clymer*, made out his title, under a regular and undisputed will of his grandfather *John Clymer*, dated 17th Feb. 1743, and executed in the presence of three witnesses, disposing of his freehold, as well as of this copyhold estate to the lessor of the plaintiff in fee; the testator *John Clymer* having previously surrendered the copyhold to the use of his will.

The title of the defendants (who were purchasers under another *William Clymer*, second and youngest son of *John*, and uncle to *William* the lessor of the plaintiff,) depended upon another *subsequent* will (or instrument which they called a will) made by the said *John*, as they alledged, on the 20th of

September 1745 : which, they contended, was at least a REVOCATION of his former will in 1743. And if it be *only* a REVOCATION of the former will, then *William* the youngest son of *John* must inherit as heir in *Burrough-Englisb*.

1761.

WRIGHT
ex dimiss.
CLYMER v.
LITTLE and
Another.

This will or instrument of 1745, (which was *not* under seal) was all written by one *William Medlicott*, who was son-in-law to the said *John Clymer*, (having married his only daughter *Amey*.)

It was also indorsed on the back, in the *same* hand-writing of the said *William Medlicott*, in these words—"The COVENANT and AGREEMENT of *John Clymer*:" and it was witnessed by the same *William Medlicott* and one *Elizabeth Mitchell*.

The body of it was in these words, "Know all men by these presents, That I *John Clymer* of *Barnes* in the county of *Surrey*, gent. have this day COVENANTED and AGREED in the manner and form following, that is to say ; for natural love and affection which I have and bear to my son and daughter and grandson herein after named, I do make, constitute and appoint the several estates and sums of money following, after the decease of myself and *Amey* my wife, to come to and be given to them. But first of all, my estate called *Barnes* and *Hopton*, to my wife for her life ; and after her decease, all that eighteen pounds a year, to my son *William Clymer* for his life ; and after his decease, to *William Clymer* my grandson. And as to all those COPYHOLD messuages, lands and tenement at *Barnes* in the county of *Surrey*," (which is the estate in question) "To my daughter *AMEY* the wife of *William Medlicott*, her heirs and assigns for ever ; to take and hold the same after the immediate death of myself and said wife, and not before. Dated 20 September 1745. *John Clymer*. Witness, *Elizabeth Mitchell* —*William Medlicott*."

It happened, in fact, that this *Amey Medlicott*, daughter of *John Clymer* and wife of this *William Medlicott*, died before her father,

1761.

WRIGHT
ex-dimiss.
CLYMER v.
LITTLE and
Another.

In order to be better understood, I will give a short pedigree of the family; and specify the particular times of their respective deaths.

Old JOHN CLYMER, the testator seised in fee, died in April 1746. He had issue, by his wife Amey, two sons and one daughter.

AMEY, wife of old John Clymer, died in his life-time, viz. 7 February 1745.

JOHN CLYMER, eldest son died in his father's life-time; leaving issue, a son and a daughter.

WILLIAM CLYMER, second son died a widower, without issue.

AMEY CLYMER married William Medlicott; she died in her father's life-time, viz. in January 1745, without issue.

WILLIAM CLYMER, lessor of the plaintiff.

AMEY CLYMER, died an infant.

Upon the death of old John Clymer, in 1746, his second son William Clymer was admitted to this copyhold estate, (the premises in question,) as heir in *Burrough-English*; the above mentioned will of old John Clymer in 1743, being then UNKNOWN to every body except the above named William Medlicott, who had it in his possession, but secreted it.

This William, youngest son of John, enjoyed the estate until 1751; and afterwards aliened it to one Mitchell; who was admitted in 1751; and afterwards sold it to one Penley. Penley was admitted; and afterwards sold part of it to Little, one of the present defendants; who was admitted to that part: the other part descended to Penley's heir; who was admitted thereto, and then sold it to Pelham, another of the present defendants; who was also admitted in due manner,

During the time of all these transactions, the lessor of the plaintiff was at first a minor, then at sea, always poor, and remained ignorant of the will in 1743; till the death of William Medlicott, who produced it when dying, and directed it to be delivered to the lessor of the plaintiff.

William Medlicott died in May 1747. He had the custody of both wills, till a few weeks before his death. The latter will was found amongst his papers. The former was delivered by the said William Medlicott to one Edwards, about three weeks before his death: and it was, about three months after, delivered to William Clymer the lessor of the plaintiff; who was then about two years under age, but proved it in 1751.

After

After this discovery, the lessor of the plaintiff did not bring this ejectment, till after an acquiescence of 14 or 15 years from his uncle's first admission to it upon old *John's* death; or at least without the nephew's setting up any claim within that time; during which his uncle *William*, or the purchasers under him, had been in quiet possession.

1761.

WRIGHT
ex dimiss.
CLYMER v.
LITTLE and
Another.

At the trial, the lessor of the plaintiff produced and proved the will of 1743: under which, he was devisee of this estate, in fee.

To encounter this evidence, the defendants produced this will or instrument of 1745: and both the witnesses to it (*Elizabeth Mitchell* and *William Medlicott*) being dead, they proved their hand-writings, and also the hand-writing of old *John Clymer*, in the common and ordinary form.

Whereupon the plaintiff's counsel insisted, that this will or instrument was, in the first place, an absolute FORGERY; and in the next place, that in point of law, it could NOT operate as a REVOCATION of the will in 1743.

And they called *Mary Victor*, sister to the said *William Medlicott*, who was one of the subscribing witnesses to the will or instrument of 1745: which *Mary Victor* swore, "That whilst she was attending her said brother *William Medlicott* in his last illness, and about three weeks before his death, he pulled out of his bosom the will of 1743, and said, "It was the TRUE will of *John Clymer*"; and then delivered it to her, with directions to deliver it over to *William Clymer* the lessor of the plaintiff, or to *Mr. Faulkner*." and she added, "That one *Edwards* was present at the time."

This *Edwards* (who had been already called on the part of the defendants, to prove the hand-writing of *Elizabeth Mitchell*, one of the witnesses to the will or instrument of 1745,) on being cross-examined on the part of the plaintiff, confirmed *Mary Victor's* evidence "That *Medlicott* did pull the will of 1743 out of his bosom, and gave it to her with such directions as she had deposed."

Upon *Mary Victor's* cross-examination by the counsel for the defendants, she not only persisted in what she had before deposed, but also added that at the same time that *William Medlicott* produced the will of 1743, as the true will of old *John Clymer*, HE ACKNOWLEDGED and DECLARED to her

1761.

WRIGHT
ex dimiss.
CLYMER v.
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Another.

"That the said will or instrument of 1745 was FORGED BY
"HIMSELF."

No objection was made to this evidence, by the counsel for
the defendants, at the trial.

The judge and jury (a special one) perused and examined
the two instruments of 1743 and 1745, and their different
signatures;—and took notice of the circumstances of the latter,
being all of the hand-writing of this *William Medlicott* him-
self; and disposing of a fee to *Medlicott's* own wife: and,
upon the whole, they were all of opinion, "That it was a
"FORGERY." And the judge directed the jury to find for the
plaintiff: which they did.

On *Tuesday* 10th *November* 1761, Mr. Norton moved, on
behalf of the defendants, for a *new trial*; upon the foot of a
misdirection by the judge who tried the cause, upon a point of
evidence: and a rule was made to shew cause why the verdict
should not be set aside, and a new trial granted.

* I have already
endeavoured to
throw the whole
together, as
clearly as I was
able.

This cause coming on to be argued yesterday, (19th *Novem-*
ber 1761,) Mr. Justice WILMOT reported the * evidence from
Lord Chief Justice *Willes*; who tried the cause, and who was
satisfied with the evidence, and reported that *no objection was*
made, at the trial, to the evidence given by this witness *Mary*
Victor.

Mr. Justice *Wilmot* having made his report, and several ad-
ditional circumstances, not mentioned in the report, having been
agreed by the counsel on both sides;—

Mr. Norton proceeded. He objected to the admission of this
evidence, as being only HEAR-SAY evidence. What *Medlicott*
said, ought not to be admitted or regarded: for it was not said
upon oath, nor was there any opportunity of cross-examining
him.

Indeed, this evidence would have been of little or no weight,
even if he had given such a testimony HIMSELF; after having
himself solemnly attested this will, as a witness to it.

This pretended declaration was made near fifteen years ago
(for he died in 1747 :) and yet the ejectment was not brought
till 1761.—This sort of evidence shall not overturn a title
confirmed by so many years possession.

Besides,

Besides, we are a *purchaser* for a *valuable* consideration under the heir at law; to whose title no objection was ever made.

Mr. *Eliab Harvey*, for the plaintiff, admitted the *possession* to have gone in the course of *descent* in *Burrough-English*: but observed that the granting new trials is not so necessary in *ejectment* as it may be in other cases; because it is easy to bring another *ejectment*.

As to the *length of time* they have been in possession—*William* the grandson (the lessor of the plaintiff) was *poor*, a *minor* at sea, and *ignorant* of the will in 1743.

Our title stood upon an *unexceptionable will*. Their's is rather a *deed of covenants*: but they insisted upon it as a *testamentary act* and a *revocation*.

Their own witness, *Edwards*, proved in the course of giving his evidence, "That *Medlicott* did produce out of his bosom, the will of 1743, and delivered it to *Mary Victor*, to be given to the lessor of the plaintiff or to *Mr. Faulkner*."

We called this *Mary Victor*, not to give evidence of the *forgery*, but to *impeach the credit* of their evidence *William Medlicott*.

If *Medlicott* had been *living*, he must have been called to prove the will. And if he had owned "*That he forged it*," it could not have been established: or if he had proved the *execution* of it, we should have been at liberty to *discredit* his personal evidence, by *showing* "*That he had himself owned it to be a forgery*." And surely, we may give the *SAME* evidence after he is dead, in contradiction to the proof made by other persons, of his hand-writing.

In this second instrument of 1745; there is a disposition "to *Medlicott's* wife, in fee:" she died before the testator. But it was *no will*, *no testamentary act*, nor even a *deed*.

This is the verdict of a *special jury*. And Lord Chief Justice *Willes* compared the papers, and declared "*That it bore the appearance of a forgery*." The jury thought so too. And their verdict ought to stand.

Lord

1761.

WRIGHT
ex dimiss.
CLYMER v.
LITTLE and
Another.

1761.

WRIGHT
ex dimiss.
CLYMER v.
LITTLE and
Another.

LORD MANSFIELD ordered both the wills or instruments to be produced here, to day: to which time it was adjourned.

And they being now, accordingly produced—

Mr. Norton for the defendants, proceeded, to the following effect. We could have proved this will, even *without calling Medlicott*, if both the witnesses had been living; or if *Medlicott* himself had been alive and been called, he might have explained the occasion of his saying such words to such a person and at such a time.

The *consequence* of admitting such evidence as this is, would be fatal: and no purchaser under a will could be safe.

Here were many *notorious changes of the property*; and an absolute *acquiescence* all the time, by the lessor of the plaintiff.

The wills are now both of them before the court. That of 1745 enures either as a *will of copyhold land*; or as a good writing to *appoint the uses* of a surrender of copyhold land; or, at least, as a *revocation* of the will made in 1743.

First, it is a good will of *copyhold* lands. *Copyhold* lands are *not within* the statute of frauds, and *no witnesses at all* are necessary to such a will. It is a good will under the statute of Hen. 8. * That statute only requires "That it be a will in
*32 H. 8, c. 1. "writing."

I agree that here is no disposition of the *personal* estate, or any appointment of an *executor*. But still it is a good will of *copyhold* land: for neither of those are necessary in a will of copyhold land. It gives an estate for life to his wife, with remainder to *William Clymer*, under whom we claim. And the ecclesiastical court have received it, and suffered it to be proved as a *will*.

Secondly, it is a *good instrument to appoint the uses of a surrender*.

ANY writing is sufficient for *this purpose*: it needed not any attestation.

Thirdly, at least, it will operate as *revocation*.

Revocations

Revocations are favoured, both in law and equity. There are many methods of revocation: a will may be revoked by mere operation of law; without the intention of the party. A feoffment without livery, a bargain and sale without enrolment, a grant without attornment, are sufficient to do it.

But by his own act, a man may by writing revoke one will, without making another.

Before the statute of frauds, he might have revoked it verbally, by mere parol only.

Any act inconsistent with the will, though ineffectual to the purpose it was intended for, yet being done by the maker of the will, is a revocation; because it shews his intention to revoke the disposition he had before made of his estate.

This writing fully shews the *animus revocandi*; which alone is sufficient. It is indeed a very inaccurate instrument; but it is in writing; and he says * "I have agreed that my estate shall go so and so." And this will or writing shews his intention of a total revocation of the former: for, by this, he disposes of his land to a very different purpose from the former disposition of it by the will of 1743.

Both wills were read in Court.

Mr. Harvey and Mr. Lee argued for the lessor of the plaintiff, William Clymer, the grandson.

They observed that Mr. Norton's objection was confined to the evidence of Mary Victor, sister to William Medlicott, one of the witnesses to the will of 1745; and they observed too, that her evidence was corroborated by the evidence of Mr. Edwards, one of their own witnesses.

But it was to be further observed, they said, that the verdict was not founded on this evidence ONLY: For the special jury actually saw and deliberately perused the will or instrument of 1745; and upon such view, inspection and examination, and upon all the circumstances of the disposition, they judged it to be a forgery.—Besides, no objection was taken to this evidence, at the trial. They might have objected to it then, or demurred to it.

1761.

WRIGHT
ex dimiss.
CLYMER v.
LITTLE and
Another.

• Vide ante
p. 1243.

1761:
WRIGHT
ex demiss.
CEYMER v.
LITTLE and
Another.

As to *acquiescence*.—The lessor of the plaintiff was but seventeen years of age, when his grandfather died; was always poor; and was at sea, the most part of his time.

But as to the EVIDENCE itself—it was *strictly* and *legally* *admissible*. It was not given in order to *prove the forgery*; but to *DISCREDIT* their evidence arising from the proof of *Medlicott's* hand. *Medlicott* must have been called *if living*; and would have overturned the will or writing of 1745, by giving this evidence of what *Mary Victor* swears he owned to her. The present proof is only "That he was a subscribing witness." And this evidence might be and was proper to be given to take off the force of such his attestation.

As to the *legal operation* of this will or instrument of 1745.

First, It is *no good will of LAND of any kind*: there is *no animus testandi*; no publication; no mark of a will.

Secondly, Neither can it be a sufficient *appointment of the uses* of a surrender made to the use of a WILL; when it is *not a will* at all, nor even a testamentary appointment.

Thirdly, Nor can it operate as a REVOCATION of the former will. Here are no *words* of revocation; no declaration of an inclination to it: *no such intention* appears. Revocations are *not favoured* now: the statute of * *frauds* settles the point, in what manner they shall be made. Feoffments to uses, bargains and sales inrolled, and grants operate by relation to the life-time of the testator: and a feoffment without livery, a bargain and sale without inrolment, or a grant without attornment, are only incomplete. But a *mere covenant* "To make a feoffment in fee," without more, is no revocation of a will: as was determined in the case of *Montague v. Jeffereys*, in *Moore* 429. and 1 *Ro. Abr.* 615. pl. 3.

Little or nothing is to be found about revocations of wills of *copyhold* lands. But it has never been determined "That a will of copyhold is *not* within the *revoking* clause of "the statute of *frauds*."

A will of copyhold lands cannot *now* be revoked by *parol*: it must be by some *other will* declaring the same. In the case of *Eggleston et al. v. Speke*, 3 *Mod.* 258. the second will did not operate as a revocation of the former; because it

it was not a good will in all particulars, and there was *no such declared intention.* *Carthew 79. S. C.*

But a mere *covenant* and agreement will not revoke a will. 1 *Ro. Abr.* 615. pl. 3. Title *devise*, letter P. And yet that was a covenant in pursuance of a marriage: which makes it a very strong case.

The words "*constitute and appoint*" are *not testamentary words*: nor is there any *publication* of this writing. It is not *under seal*: which it ought to be, in order to revoke what is under seal. Therefore, as an *appointment*, it cannot revoke the former will. It ought also to have been done in the presence of *three* witnesses, by the statute of frauds. The twenty-second section takes care of the *revocation* even of wills of *PERSONAL* estates; though it does not meddle with the *making* them. And this is a ground for a presumption "That the legislature considered *copyhold* wills to be within the provision of the statute, as to the *revocation* of *THEM*, too."

The revocation in the present instance, must be extended to the will of the freehold as well as of the copyhold, if it operates at all: it can not operate as a revocation of *part* of the former will, and *not* as a revocation of *another* part. It must be an intention to revoke the *whole*: it must intend to *give to another*, as well as to *take from* the former. In the case of *Onions v. Tyrer*, 1 *Williams* 345, Lord *Cowper* argues upon this principle, "That if the second devisee took nothing, the first devisee could *lose* nothing." But in this case now before the court, nothing is given to any other person. This *covenant* is no revocation of a will. 2 *Peere Williams* 623. *Cotter v. Layer*. And it can not take effect as a testamentary revocation.

The defendants can not be purchasers for a valuable consideration, under a public notoriety; and *without notice* of our claim. All the purchasers were *under notice* of a will: and the defendants consulted counsel upon the validity of it.

This evidence is *admissible*; because it was the solemn declaration of a dying man to his nearest relation; which is equal to an oath: for such declarations of dying men have been admitted as evidence even in cases of *murder*. So that it ought not to be called "*MERE hearsay evidence.*"

But their objection comes *too late*; as it was *not taken* upon the trial: they even *cross-examined* the witness. So is *Lucas's Rep.* 202, 203. *H. 12 Ann. B. R. Queen v. corporation of Hefson*—"If counsel do not, at the trial, insist

1761.

Waight
ex dimiss.
CLYMER v.
LITTLER and
another.

1761.

WRIGHT
ex dismis.
CLYMER V.
LITTLE and
Another.

"upon an objection, there ought to be no new trial." *H. 2 G. 2. Fitz-Gibb. 40.* anonymous. Mr. Lee moved for a new trial, because his client had made a mistake in point of evidence; and it was denied; because "*Vigilantibus non dormientibus jura subserviunt.*"

This express evidence of the direct forgery came out upon Mr. Knowler's cross-examination of our witness (this Mary Victor;) not upon our examination of her.

Mr. Norton, in reply.—This will of 1745, says "I appoint my lands to come to and be given to, &c." It can not be a covenant to stand seised: there is no seal, no covenantee; and besides it is copyhold; of which there cannot be a covenant to stand seised. It must operate as a revocation.

Wills of copyholds are not within the statute of frauds; either as to the making or as to the revocation of them. They stand just as they did: the revoking clause can never extend to them, when the enacting clause does not.

As to the case of *Eggleston et al. v. Speke. 3 Mod. 258.*—The nature of the estate is different from this. This is a revocation of the will in toto, quoad the copyhold land.

A will may be good as to copyhold, though bad as to freehold; therefore so also may a revocation be.

An instrument may operate as a revocation; though it be void as to its professed end and intention: as, for instance, a will devising land to a papist.

As to the case in *Peere Williams 345.*—There was no intention to revoke the will, and let in the heir at law.

But in the present case, the two acts of the testator are inconsistent. This is not a covenant to do the thing; but actually doing it; it does not rest in futuro.

Nothing passes by a feoffment, without livery; or by a bargain and sale, without enrolment; or by a grant without attornment: and therefore in such case, there can be no reference backwards.

LORD MANSFIELD—The defendants came to the trial, apprized of the plaintiff's title, and prepared to encounter it.

There

There is no doubt as to the will of 1743; which is the plaintiff's title. The only answer to it, which the defendants now alledge, is "That the instrument of 1745 has revoked it." And they do not suggest that they can give any new evidence in support of that instrument or the point of revocation. The jury have found for the plaintiff: consequently, "That the will of 1743 was *not* revoked." Lord Chief Justice *Willes* is satisfied with the verdict. This motion therefore and the argument in support of it, as there is no pretence that the defendants can mend their case upon a new trial, is in the nature of an appeal from his opinion.

There are three grounds, any *one* of which, if made out, is sufficient to support this verdict. If the instrument of 1745, was *forged*; if it was *obtained by fraud and imposition*; though not forged; or, though duly and fairly executed, if it be no revocation.

As to the first ground, the defendants complain, that the Chief Justice misdirected the jury, by leaving to them as evidence the declaration of *Medlicott* "That he forged it."

Answer. It came out upon their *own* examination; they made no objection to it at the trial; and it certainly was a circumstance *proper* for the jury to consider. The competence of evidence depends upon the circumstances under which it is given. The will of 1743 is set up after fifteen years. It was necessary to shew how it was secreted, and how discovered, the declaration of *Medlicott* in his last illness, when he produced and delivered it for the use of the plaintiff, is allowed to be competent and material evidence. The instrument of 1745 was equally in his custody and secreted. The account he gave of it in his last moments is equally proper. Even though it had been upon an examination by the plaintiff, (especially as it was all written and witnessed by him, and gave the premises in question to his wife,) as the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience; I am of opinion "The evidence was proper to be left to the jury."

But independent of this declaration, *forgery* or *fraud* was *apparent*. *Medlicott* appears to have been a bad man. It is all written by him, and gives the fee to his wife, in prejudice of *John Glynn*'s male issue. It is worded as an irrevocable settlement; without cause or consideration. *Medlicott* never

1761.

WRIGHT,
ex dimiss.
GLYNN v.
LITTLE and
Another.

1761.

WRIGHT
ex dismiss.
CLYMER v.
LITTLE and
Another.

dared to produce it; and chose rather to conceal the will of 1743, that the younger son might be admitted and possess the premises.

But lastly, This paper is no *revocation*. It is no will: and therefore can not direct the uses of the surrender. It is no conveyance. It is no agreement with any body. It does not purport having been delivered to or for the use of any body. There is no proof that it was out of the custody of *John Clymer*, before his death. It ought not to have been out of his custody; because it is voluntary and without any consideration. He could not have been obliged to perform it. Then it amounts to no more than his bare saying "That he *intended* to make a will or surrender to the use of his daughter, in fee;" and *did* neither. An INTENTION to revoke by a future act which a man can not be compelled to perform, is no revocation, *till* the act is *done*. All the cases are so: and the reason is evident.

It is to no purpose, to grant a new trial; because I am satisfied that the verdict is, in every light, agreeable to the true justice of the case.

Was it a measuring cast, or if the defendant had been *surprized* by the plaintiff's title, I should have thought otherwise.

The defendants are purchasers from the heir of a copyholder duly admitted. There has been a possession above fifteen years. The title set up by the plaintiff, is a will *concealed*.

But, be these favourable circumstances as they may, the trial had is satisfactory beyond a doubt: and the defendants can not mend their case. Therefore it would be vain and vexatious, to grant a new trial.

The three other judges declared their entire concurrence; but declined expatiating upon it, or entering into particulars, as Lord *Mansfield* had so very fully gone through it.

Per Cur'.

The RULE must be DISCHARGED.

Rex *versus* James Wheeler.

THE defendant came up, to receive the judgment of the Court; having been reported in contempt.

(1 Black. Rep.
311. S. C. but
not S. P.)

Monday 23
Nov. 1761.

Party in contempt for filing a bill in chancery to set aside an award, after entering into rule of court of king's bench, to abide by it, discharged without any fine, rather than set a small one for so high an offence.

The

The *contempt* was this—the defendant *Wheeler*, being a vintner, had bought two pipes of wine of one *James Stuart Tulk*: which wine the defendant asserted to be adulterated and bad, and therefore refused to pay for it. Whereupon *Tulk* brought his action against him for the price. At the trial, the matter was, by CONSENT of both parties, (probably to conceal the secrets of the trade, and the nature and degree of mixing,) referred to the arbitration of one Mr. *Charles Corderoy*: *Wheeler* consented to abide by his award, and NOT to bring any bill in EQUITY. This rule of *nisi prius* was made a rule of this court. *Corderoy* awarded "That *Wheeler* should pay *Tulk* a certain sum of money, (about 20*l.*) for this "wine." *Wheeler* refused to pay the money awarded; and moved this Court "To set aside the award."

1761.

 REED.
 WHEELER.

Upon hearing that motion, the Court thought there was no ground to set aside the award; but that it ought to be performed. Upon which, the defendant performed the award, and paid the money. Afterwards, he was so ill advised as to bring a long bill in the court of chancery. The plaintiff here (defendant in equity) moved this Court for a rule to shew cause why an attachment should not issue against him, for bringing a bill in equity, contrary to the rule of this Court made by consent.

Upon the motion, the Court expressed their resentment, and made a rule to shew cause.

The vacation then coming on, the defendant filed a supplemental bill in chancery, stating the motion for an attachment, and praying an injunction and relief.

The plaintiff here (defendant in equity) pleaded, in bar, the rule of this court: which plea was allowed.

Upon shewing cause here, against the attachment, the Court, from abundant indulgence, heard, a second time, every thing which could be said to impeach the award. But they continued of their former opinion, in support of the award: and the rule for the attachment was made absolute of course.

He was taken up upon the attachment: and interrogatories were filed. He was examined; and the interrogatories and examination were referred to me. I reported him in contempt: for he explicitly owned the fact of bringing an original and supplemental bill in chancery; though he pretended that

1761.

REX V.
WHEELER.

he did not understand that he had ever consented "Not to bring a bill in equity," nor ever meant any such consent.

Afterwards, upon his being driven to the brink of commitment, he was forced to submit: and it was referred to me to inquire "Whether he had procured the bill brought by him against *James Stuart Tulk*, *Charles Corderoy*, and *James Jefferson* in the court of chancery, to be dismissed," and also to liquidate and ascertain the amount of the costs out of purse of the said *James Stuart Tulk*, *Charles Corderoy*, and *James Jefferson*, occasioned by his having filed a bill and proceeded in chancery against them, in contempt of the order of this court. And the Court adjourned the consideration of the judgment for his contempt, until after I should have made my report.

Immediately after the making this rule, the defendant dismissed his bill in chancery; and readily attended and submitted to the taxation of all the costs which the three persons mentioned in the rule had been put to, out of pocket, as well in the court of chancery as in this court, arising from his contempt: all which costs, (which were amply allowed, pursuant to an intimation from the Court "That they ought to be so," and amounted to 87*l* 4*s*.) he immediately paid; and perhaps his own might be as much more, at least.

All which was now laid before the Court; and nothing remained, according to the ordinary course of proceeding, but for the Court to have passed judgment upon him for his contempt.

THE COURT was unwilling to punish him further, by *fine* and *imprisonment*; as he had smarted severely: and yet, as his contempt was so obstinate, they did not care that a *slight* sentence should stand upon their records. Therefore they waved giving judgment, by consent.

They said, they would not receive more complaints *now*, upon this occasion: but that the attorney and counsel were equally guilty of the contempt, and more criminal; and if it ever happened again, they would proceed against *them*.

Note—This case is a strong proof how far a contentious spirit, with bad advice, may go. The sum awarded was but about 20*l*. The cause in chancery went no farther than a plea: if it had proceeded to an examination of witnesses and a hearing, the costs must have been considerably more. And it was without the least chance of success: for, every ground

of relief in equity, against an award, is *equally* open in THIS court; upon a motion, in a summary way, "To set it aside."

1761.

REV. WATKINS.

No man would accept of being an arbitrator, if he was liable to be harassed with a chancery-suit for his pains.

THE COURT (for the reason above given) only made a rule that this RECOGNIZANCE should be DISCHARGED.

Roe, ex dimiss^o Duke of Bolton, *versus* Grantham.

Tuesday 24
Nov. 1761.

THIS cause stood in the paper, for argument of a special verdict found at the assizes for the county of *Devon*, upon an ejectment brought by the present duke of *Bolton* for lands in *East Portlemouth* in that county; part of the estate which had once belonged to *Robert Willoughby Lord Broke*, and which had been settled by a *private act of parliament* made in 27 H. 8. upon the ancestors of the present duke of *Bolton*, with a clause to restrain alienations, except for the jointures of wives for term of life, &c.

Power of joint-
ress to make
leases, not being
expressed, can-
not be implied
under a private
act of parlia-
ment.

The special verdict was long; and there was a long argument upon it, at the bar: but the question was no more than "Whether the dutchess of *Bolton* could lease the lands settled upon her for life, under the power given by the exception in the said act; for *three lives*, or years determinable upon *three lives*; that being the usual manner of leasing in the country where those lands lay, and the usual manner in which they had been leased."

THE COURT was clear "That such power *not* having been given to jointresses by the said act of parliament, could *not* be IMPLIED." It would therefore be of no use, to report the case at large.

Per Cur.

JUDGMENT for the PLAINTIFF.

Midhurst *versus* Waite.(1 Black. Rep.
350. S. C.)

UPON a motion for a new trial—

Friday, 27
Nov. 1761.

It appeared upon the report of Mr. Justice *Wilmot* who tried the cause, that this was an action brought by an ale-

Deputy high
constable, ap-
pointed by parol
only, may billet soldiers, under the mutiny act.
house-

1761.

MIRREAST v.
WALTER.

house-keeper in the hundred of *Evinger* in *Hants*, against a DEPUTY *high constable*, for billeting soldiers upon him; and that the high constable living at a distance, had appointed the defendant his deputy, by *parol* only; and to do this business of quartering soldiers for him, during the whole time of his continuance in that office.

The questions were—(first) whether a *high constable* is a common-law officer; (secondly) whether a *high constable* is within the word "CONSTABLE" in the annual mutiny act, so as to empower him to *billet soldiers*; and (thirdly) whether a high constable can appoint a deputy for this purpose.

Mr. Justice *Wilmot* reported, that at the trial, he was of opinion in the affirmative, on all the three points.

Mr. *Thurlow* and Mr. Serjeant *Davy*, on behalf of the plaintiff, argued to the contrary; and particularly insisted that the deputation ought, at least, to have been in *writing; and also that the deputy could not billet them in his town name.

9 Co. 46.
Earl of
Shrewsbury's
Case.
† 1 Ro. Rep.
274 Phelps
v. Winscombe.

The constable of the hundred can not billet soldiers, in places where there are other officers: the act only gives him this power in the absence of the officers of the place. This appears particularly from § 35, 36, of this act. So, by 2, 3 Ed. 6. c. 10. about making malt, the power of viewing it is given to the constable of the town where it shall be made or put to sale.

Secondly, But, at least, he could not appoint a deputy for this purpose. This person, the now defendant, was never approved of nor sworn.

In the act of 1 W. & M. c. 18. § 7. there is a provision about dissenters chosen constables, "That they may execute the office by a deputy that shall comply with the law." But the person appointed under this act could not be a deputy, but a constable in his own right.

No judicial officer can appoint a deputy. *Phelps v. Winscombe*, 3 Bulstr. 77. 1 Ro. Rep. 274. *Moore* 845. 2 Danv. 482. pl. 1.

An under-sheriff can not exercise a judicial act. *Hob.* 13. *Sir Daniel Norton v. Simmes*. *Noy* 21. *Bandal's case*.

A high

A high constable is, in *some* respect, a *judicial* officer: and the *billeting* of soldiers is a *judicial* act. This act is the effect of the judgment of the agent: and an *appeal* is given from his act.

1761.

MIDDEAST &
WAITE.

By 9 *Ed. 4. fo. 31.* A sheriff can not make a deputy to take security upon a supplicavit; though, to take the party, he may.

Mr. *Webb contra*, for the defendant.

First. A *high constable* is included in the mutiny-act: the words are "constable, tything-man, head-borough, or other officer."

Secondly, He may make a deputy for this purpose.

First—He argued from the act itself.

LORD MANSFIELD—Surely, it is impossible, to maintain "That a high constable is *not* within the act."

Mr. *Webb*—proceeded to the

Second point—He may appoint a deputy upon *this particular occasion*.

3 *Bulfr. 77. Phelps v. Winchcomb*, 3 *Keb. 309.* 1 *Siderf. 350.* are cases of *standing* deputies: and Lord *Hale* adopts all the doctrine laid down in the case of *Phelps v. Winchcomb*.

Taking security is a *judicial* act.

The counsel for the plaintiff, in reply, confined themselves now to the second question.

This is a *permanent, constant, general* deputy, as to all acts of this kind: not a deputy *pro ea vice*.

Lambard supposes the case of *Phelps v. Winchcomb* to have proceeded rather upon *toleration*, than upon *law*.

In *this* instance, the duty is *judicial*: and the *appeal* proves "That this was the idea of the law."

If a man be bound by tenure, to execute the office of constable, and appoint a *substitute*, that substitute himself is *sworn in*: he is *not* a deputy.

An

1264

Michaelmas Term 2 Geo. 3. B. R.

1761.

MIDHURST v.
WATTEL

An under-sheriff can not execute a writ of partition.

LORD MANSFIELD—all these *niceties* were never thought of, by those persons who have for many years drawn the mutiny-acts. They are not drawn by gentlemen of the profession of the law. And the *nature of the thing*, as well as the *intention of the legislature*, requires that people should not be liable to actions for honestly executing them.

These acts are intended to guard the *civil* authority against the *military*.

The act now under consideration certainly *comprehends* a high constable; and he *may appoint a deputy to this particular ministerial act*. This is a *ministerial act*: and a constable may appoint a deputy to do *ministerial acts*.

It is taking the definition *too large*, to say "That every" act where the judgment is at all exercised, is a *judicial act*: a judicial act is supposed to be done *pendente lite* (of some sort or other.)

This construction is the most convenient, and agreeable to the rule of law in cases of appointing deputies.

Mr. Justice DENISON concurred in opinion with his lordship.

So also did Mr. Justice FOSTER: and

Mr. Justice WILMOT continued of the same opinion he was at the time of the trial.

He said, he would only now add, that he had looked a good deal into the nature of the office of high constable; and that he found it to be much more ancient than the time of *Ed. 4.*

Per Cur. unanimously—

RULE DISCHARGED.

(1 Black. Rep.
291, 356. S. C.)
Saturday, 23
Nov. 1761.

Rex *versus* George Scott and Edward Hams.

If four are indicted for a riot,

THIS was an indictment for a riot; and consisted of two counts only; there being no count added, for an assault.

two die before trial, and two found guilty, judgment shall not be arrested.

1761.

Rex v. Scott
and Another.

The first count charged that *George Scott, Lewis Delavoux, Samuel Austin, Edward Hams, Walter Bray, and John Choplin*, with force and arms, at, &c, in the street and common highway there, called the *Strand*, unlawfully, violently, and riotously did assemble and gather themselves together, to disturb the peace of our said lord the king; and so being then and there assembled and gathered together, they the said *G. S. L. D. S. A. E. H. W. B. and J. C.* then and there unlawfully, riotously and routously did follow and walk after one *Felix Sarrant*, gentleman, then and there passing along the *Strand* aforesaid, and then and there being in the peace of God and of our said late lord the king, from and out of the *Strand* aforesaid, unto the dwelling-house of him the said *F. S.* situate in *Blue-Cross-Street* in the parish and county aforesaid, insulting, abusing, menacing, and hollowing after him the said *F. S.* whereby he the said *F. S.* was then and there put in great peril and danger of losing his life; and other wrongs to the said *F. S.* then and there unlawfully, riotously and routously did, &c. &c.

The second count charged that *George Scott, Lewis Delavoux, and Edward Hams*, with force and arms, at, &c, in the said street and highway there, called *Blue-Cross-Street*, near the dwelling-house of the said *F. S.* there situate, unlawfully, riotously, and routously did assemble and gather themselves together, to disturb the peace of our said lord the king, (he the said *F. S.* then being in the same house and in the peace of God and our said lord the king,) and so being then and there assembled and gathered together, they the said *G. S. L. D. and E. H.* did then and there unlawfully, riotously and routously make, and cause, and procure to be made, a large fire in the street and highway aforesaid; and in the same fire then and there unlawfully, riotously and routously, did burn, and cause to be burnt, him the said *Felix Sarrant* in effigy; and they the said *G. S. L. D. and E. H.* then and there unlawfully, riotously and routously did remain and continue in the street and highway aforesaid, near the fire aforesaid, for a long time (to wit, for the space of two hours and upwards,) hollowing, shouting, firing guns, squibs, and fireworks, and misbehaving themselves; and other wrongs to the said *F. S.* then and there unlawfully, riotously, and routously did, &c, &c.

Mr. Morton had (on Saturday the 30th of May last) moved in arrest of judgment: for, that only two of the defendants had been convicted; the * rest having been acquitted, Whereas three persons, at the least, are necessary to constitute a riot: and as this is an indictment for a riot, and only two are found guilty, there can be no judgment given against them.

* The fact was, that two died; two were acquitted; and two convicted.

And

1761.

Rex v. Scott
and Another.

And to prove "That if several persons be indicted for a riot, and two only found guilty, and the others all acquitted, judgment shall be arrested, because a riot can not be committed by two persons only;" he cited *Popham* 202. *Harrison v. Errington* (the second error assigned;) also *Rex v. Sudbury, Heapes*, and others; 1 *Ld. Raym.* 484. 2 *Salk.* 593. and 12 *Mod.* 262. All S. C. in point. And if another offence be added, in the same count, it does not vary the case: so is *Rex v. Colson et al'* 3 *Mod.* 72.

Mr. Norton and Mr. Stow now shewed cause, on behalf of *Sarrant* (a quack doctor) the prosecutor, why judgment against the defendants should not be arrested.

It has been objected "That it being an indictment for a riot, and no other count laid, three persons at least ought to have been found guilty; or else, it can be *no riot*."

But where the indictment is "That the defendants *cum multis alijs* committed a riot," there *two only* may be found guilty; and judgment shall be against them. 1 *Sir J. S.* 196. *Rex v. Kinnerley and Moore*. And so *Holt* held in the case of *Rex v. Sudbury et al'*.—These two, with others (six in all,) are here charged: and two of the others are dead, without having been either convicted or acquitted.

Mr. Morton, *contra*, for the defendant. In the case cited from *Sir J. S.* 196. (*Rex v. Sudbury, Heapes*, et al':) it is supposed "That the defendants together with other persons unknown," were guilty." But in the present case it does not appear that any others were guilty, besides these two: for here is no finding as to the two dead persons.

LORD MANSFIELD—Six were indicted: two of them are acquitted; two are dead, untried. The jury have found these two to be guilty of a riot: consequently it must have been together with those two who have never been tried; as it could not otherwise have been a riot.

Per Cur'.

RULE DISCHARGED.

The End of Michaelmas Term 1761. 2 G. 3.

HIL

Hilary Term,

2 Geo. 3. B. R. 1762.

Rex versus Barker et al'.

ON Wednesday 10th of June 1761, Mr. Norton moved for a MANDAMUS to be directed to the surviving trustees under a deed of release made by one Charles Vinsen to John Enty, a dissenting minister at Plymouth, and other trustees, settling a then new-built meeting-house, garden, &c. upon the said trustees, in trust (amongst other things) "To suffer the meeting-house to be for the public worship of God by such congregation of protestant dissenters commonly called presbyterians, as should sit under and attend the ministry of the said Mr. John Enty or such other presbyterian minister or ministers as should in his and their room successively, in all times then coming, be, by the members in fellowship of the said or such like congregation or congregations, regularly and fairly chosen and appointed to be the minister, preacher or pastor, to preach in the said meeting;" requiring them to admit Christopher Mendis to the use of the PULPIT thereof, as pastor, minister, or preacher there; he the said Christopher Mendis being duly elected thereto.

He produced an affidavit of the facts, and of Mr. Mendis's election; and of demand and refusal of the use of the meeting-house: and he cited the * case of *Rex v. Bloore, P. and Tr.* 1760, which was a mandamus to restore William Langley to the office of curate of a chapel; and the rule was made absolute upon this principle, that where there is a temporal right, this "Court will assist by mandamus."

Lord MANSFIELD took this opportunity of declaring, That the Court had thought of that case of the curate of the chapel of Calton, since the determination of it; as well as before: and they were thoroughly

(1 Black Rep.
300. 352. S. C.)

Saturday, 23 Jan.
1762.

Mandamus to trustees of a meeting-house, to admit a dissenting teacher, granted.

* Vide ante p.
1043 to 1046.

1762:

REX v.
BARKER and
Another;

roughly satisfied with the grounds and principles upon which *that mandamus* was granted:

Where there is a *right* to execute an office, perform a service, or exercise a franchise; (more especially if it be in a matter of public concern, or attended with profit;) and a person is kept out of possession, or dispossessed of such *right*, and has no other specific legal remedy; this court ought to assist by a *mandamus*; upon reasons of *justice*, as the writ expresses—*Nos A. B. debitam et festinam justitiam* “*in hac parte fieri volentes, ut est justum;*” and upon reasons of public policy, to preserve peace, order, and good government.

The interposing this writ where there is no other specific REMEDY, is greatly for the benefit of the subject and the advancement of justice. The speedy decision of the question, in that case which has been mentioned, by an immediate trial in a feigned issue, shews it.

This case is not indeed quite the same as that was: but still it is reasonable to grant a rule to shew cause.

On Monday, 13d November 1761, Mr. Thurlow and Mr. Dunning shewed cause against the *mandamus*.

They controverted, by affidavits, the election of *Mends*; and endeavoured to support the election of Mr. *Hanmer*; whom the trustees had put into possession.

The majority of the congregation seemed to be on the side of *Mends*: the trustees espoused *Hanmer*, and meant to maintain him with a high hand.

There was no colour for the election of *Hanmer*; and that of *Mends* was liable to objections.

This contest had raised great animosity, spirit, and obstinacy; especially in those who were for *Hanmer*: and as they thought their strength lay in throwing obstacles in the way, of any (more especially a *speedy*) redress, as *Hanmer* was upholden and maintained in possession by the trustees; their counsel, with great earnestness and ability, argued against making the rule absolute for a *mandamus*; and contended that it could not be “to admit,” where another was in possession.

A *mandamus* “to admit” goes no further, (they said) than to give a LEGAL possession where otherwise the party would be without

without remedy. And to prove the distinction between a *mandamus* to *admit*, and a *mandamus* to *restore* to a former possession,—They cited the case of *Rex v. dean and chapter of Dublin*, 1 Sir J. S. p. 538. per Pratt. “A *mandamus* to *admit* is only to give a *legal*, not an actual possession: “though, in a *mandamus* to *restore*, the court will go “further.”

1762.

REX V.
BARKER and
Another,

But here, another person (Mr. Hammer) is in possession: and Mr. Mends never has been so. Here is no LEGAL right: and this court can not take notice of TRUSTS, so as to give relief, upon an equitable title only. Nor is this gentleman the *cestui qui trust*: at most, his title is only equitable.

LORD MANSFIELD—A *mandamus* is a prerogative writ; to the aid of which the subject is intitled, upon a proper case previously shewn, to the satisfaction of the court. The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.

Within the last century, it has been liberally interposed for the benefit of the subject and advancement of justice.

The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied.

Writs of *mandamus* have been granted, to admit *lecturers*, *clerks*, *sextons*, and *scavengers*, &c; to restore an alderman to precedence, an attorney to practice in an inferior court, &c.

Since the act of toleration, it ought to be extended to protect an endowed pastor of protestant dissenters; from analogy and the reason of the thing.

The right itself being recent, there can be no direct ancient precedent: but every case of a lecturer, preacher, school-master, curate, chaplain is in point.

The DEED is the foundation or endowment of the pastorate. The form of the instrument is necessarily by way of trust: for the meeting-house, and the land upon which it

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Another.

stands, could not be limited to *Enty* and his successors. Many lectureships and other offices are endowed by trust-deeds. The *right* to the function is the *substance*, and draws after it every thing else as appurtenant thereto. The power of the trustees is merely in the nature of an authority to admit. The use of the meeting-house and pulpit, in this case, follows, by necessary consequence, the right to the function of minister, preacher, or pastor; as much as the *insignia* do the office of a mayor; or the custody of the books, that of a town-clerk.

Mr. Justice WILMOT—It has been granted in the case of scavengers. It is a *prerogative writ*, and shall be granted to amplify justice, and to preserve a right; where there is no specific legal remedy; where no assize will lie.

Mr. Justice FOSTER—Here is a *legal right*. Their ministers are tolerated and *allowed*: their right is *established* therefore as a *legal right*, and as much as any other legal right.

N. B. This Mr. Hanmer was in possession, and claimed to be duly elected to the same ministry or pastordship.

THE COURT proposed an *issue* to try "Whether Mr. Hanmer was or was not *duly elected*"; as the cheapest and best way to put it in.

It was then adjourned to the first day of this present Hilary term, in order that the parties might give an answer; "Whether they would agree to *this issue*;" or "Whether they would agree to proceed to a *new election*:" and the parties themselves to be consulted, and make their election;

But afterwards, (on Tuesday 24th November 1761,) Lord MANSFIELD proposed and made an alteration in the rule to be drawn up in this case: which alteration he judged to be necessary, as Mr. Hanmer himself was no party to this litigation about the *mandamus*.

He therefore directed it to be drawn up to the following effect, (and indeed gave the very words :) viz.

It is ordered, That the first day of next term be given to *Pentecost Barker, Richard Dunning, Philip Corkey, and Elias Lang*, to shew cause why a writ of *mandamus* should not issue, directed to them, requiring them to admit *Christopher Mends* to the use of the pulpit in a certain meeting-house appointed for the religious worship of protestant dissenters commonly called presbyterians, in *Plymouth* in the county of *Devon*, as pastor, minister or preacher there. And it is further

further ordered, That they the said *Pentecost Barker, Richard Dunning, Philip Cockey, and Elias Lang*, do at the same time acquaint this court, "Whether they insist upon the validity of the election of *John Hanmer*," and if not "Whether they are willing to proceed to a new election of a minister, pastor or preacher there;" The prosecutor of this rule having declared his consent "To waive his claim, in order to a new election." And it is further ordered, That notice of this rule be given to the said *John Hanmer*; to the intent that he may be heard, as he shall be advised; and that he may acquaint this court "Whether he insists upon the validity of his election; and "Whether he is willing to have it tried in a feigned issue."

1762.

 Rex v.
 Barker and
 Another.

Mr. THURLOW and Mr. DUNNING now gave an answer, by direction of their clients, "That *Pentecost Barker, Richard Dunning, Philip Cockey, and Elias Lang*, do insist upon the validity of the election of *John Hanmer*, and that they are not willing to proceed to a new election, &c. And that the said *John Hanmer* does insist upon the validity of his election, and is not willing to have it tried in a feigned issue."

After which Mr. THURLOW and Mr. DUNNING were heard again, in general; and argued strenuously against granting a *mandamus*. They knew, the election of *Hanmer* could not be supported upon a trial. The election of *Mends* seemed liable to objection as irregular. But, if the matter was proper for a *mandamus*, they were aware that in case neither was elected, the court would issue a *mandamus* "To proceed to an election:" in which case, the majority of the congregation were inclined to *Mends*. The trustees therefore obstinately persisted in opposing a *mandamus* and refusing a trial.

Lord MANSFIELD—Every reason concurs here, for granting a *mandamus*. We have considered the matter fully: and we are all clearly for granting it. I have made a collection of cases on this subject, since the last argument; but I have it not here, at present.

Here is a *function*, with *emolument*; and no specific legal remedy. The right depends upon election: which interests all the voters. The question is of a nature to inflame men's passions. The refusal to try the election in a feigned issue, or proceed to a new election, proves a determined purpose of violence. Should the court deny this remedy, the congregation may be tempted to resist violence by force: a dispute "*Who shall preach christian charity*," may raise implacable feuds and animosities; in breach of the public peace;

1762.

REX v.
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peace, to the reproach of government, and the scandal of religion. To deny this writ, would be putting protestant dissenters and their religious worship, out of the protection of the law. This case is intitled to that protection; and can not have it in any other mode, than by granting this writ.

The defendants have *refused* either to go to a new election, or to try it in a feigned issue.

We were, all of opinion, when a trial was proposed to them, that a *mandamus* ought to issue, in case of refusal. Their answer ought to be put into the rule as prefatory to it; and I do this, with a view that their refusal may be authentically given in evidence to the jury upon a trial.

Many cases have gone as far as this, or farther.

Mr. Justice DENISON, Mr. Justice FOSTER, and Mr. Justice WILMOT, all declared themselves of the same opinion.

THE COURT ordered a *mandamus* to issue.

V. Post. Pa. 1379, 1380. 28th April 1763.

(1 Black Rep.)
356. S. C. but
not S. P.)

Monday, 25 Jan.
1762.

* Mr. Norton
was this day
knighted, and
made solicitor
general.

Joint informa-
tion against sever-
al defendants,
cannot issue upon
distinct rules for
one or more in-
formation or in-
formations
against each,

Rex versus Heydon and four others.

* SIR FLETCHER NORTON shewed cause on behalf of the prosecutor, why the proceedings upon this *joint* information should not be stayed, with costs to be paid by the prosecutor; for that five *separate* rules "For one or more informations against each defendant" are *consolidated* into this *one joint* information, without any rule for such a joint information against *all* of them.

Mr. Serjeant Nares, *contra*, insisted that by the practice, this can not be done; nor does the *present* rule justify it.

Mr. ATHORPE (secondary) being asked, concurred with Mr. Serjeant Nares, "That there was no authority "by any rule, or by the practice, for filing this one "joint information against *all* the defendants."

Sir Fletcher Norton replied, that if the *offence* be joint, there may be a joint information.

Lord

Lord MANSFIELD—But the question is, whether it can be done upon these several and distinct rules, which were taken upon the motion of *several different gentlemen*, who only applied for one or more informations against *each* defendant, but without any general motion for a *joint* information against them all.

1762.

REG. V.
HAYDON and
Others.

Sir Fletcher Norton—It must be allowed, I agree, that one man's guilt is not the guilt of another: but this case is a *joint act* of bribery, upon which we can convict *all* of them; but yet the evidence may not be sufficient to convict the individuals separately.

Mr. Justice WILMOT was not satisfied of that; and seemed to doubt whether the same evidence which would be sufficient to convict *all jointly*, would not be sufficient to convict each one alone separately.

Lord MANSFIELD said he was clear that this *joint* information against all, was wrong, upon these *separate and distinct* rules for one or more against each; and that the present rule must be made absolute.

RULE made absolute, for staying the proceedings upon this *joint* information.

Churchwardens of St. Saviour's Southwark *versus* Smith.

(1 Black. Rep.
351. S. C.)
Tuesday 26 Jan.
1762.

THIS was an action of covenant against the *assignee* of a term.

Assignee of a
lease, after a
breach of cove-
nant, by the les-
sor not liable for
the breach.

The declaration set forth, that by indenture dated the 23d of *January* 1702, the then churchwardens demised the premises to one *James Richards*, for sixty years and three-quarters from the date of the indenture; that *James Richards* covenanted to repair, and to pay the rent, &c; and also covenanted to pull down the houses that stood on the *East* front of the premises, and to *build new houses* thereupon, *WITHIN seven years*; that *James Richards* entered on the 23d *January* 1702, and assigned to the defendant *Richard Smith*; and that the premises were ruinous.

1762.

ST. SAVIOUR'S
Churchwardensv.
SMITH.

The first breach was assigned, in not repairing: the defendant pleads "That the premises were not ruinous, &c." and upon this plea, issue was joined; so that it is, at present, out of the case.

The second breach (upon which the question arises) was assigned, in *not* pulling down the old houses, and *building new ones*; viz. "That *James Richards*, the original lessee, did not do it before the assignment; nor has the defendant, the assignee, since the assignment."

The defendant pleads *actio non*, &c; for that "The estate did not come to him by assignment, till AFTER the expiration of the seven years." The plaintiff demurs; and the defendant joins in demurrer.

The only question was, "Whether the ASSIGNEE be answerable for the breach incurred BEFORE the assignment."

Mr. MORTON, for the plaintiffs, argued "That he *was*." He said that as the thing was to be done UPON THE LAND, the covenant would run with the land and bind the assignee: though, he admitted, it would be otherwise, if the thing covenanted to be done was *collateral* to the land. And he would have had it supposed that the present case was within both the first and second resolutions in *Spencer's case* 5 Co. 16. and agreeable to the cases in *Cro. Eliz.* 457, 552, 553; *Moore* 159, and 1 *Jones* 223.

And though here is a *limited restricted TIME fixed* for the performance of the thing covenanted to be done, yet that *makes no difference*, he said, as to the assignee: for the restriction is *collateral* to the covenant; and is rather prejudicial than advantageous to the reversioner, as it is the better for him, the later it is done,

But the COURT were very clearly of opinion against him; without hearing Mr. *Yates*, who was for the defendant.

Lord MANSFIELD said, the single question was, "Whether an assignee is liable for a breach which he *never committed*." And it is certain "That he is NOT." This breach was committed before his time: and this covenant does not run with the land,

Mr.

Mr. Justice DENISON * and Mr. Justice WILMOT concurred; and observed that it was so settled in the case of † *Grescot v. Green*. P. 12 W. 3. B. R. 1 Salk, 199. "Lessor covenanted for him and his assigns, to rebuild and finish a house within such a time: after that time, he assigned; the house not being built and finished. Per Holt Chief Justice, this covenant shall not bind the assignee; because it was broken before the assignment: Aliter, if broken after; as if the lessor had assigned before the time expired."

1762.

ST. SAVIOUR'S
Churchwardensv.
SMITH.* Mr. J. Foster
was absent.

† V. Holt 177.

JUDGMENT for the DEFENDANT.

Stephenson, Gent. *versus* Hill.

THIS was an action brought upon the statute of 2 E. 6. c. 13. for the payment of tithes of corn and grain.

Whether customary tenants can prescribe in non decimando, and how.

The defendant pleaded the general issue, "*Nil debet*": and the cause came on to be tried before Mr. Justice Bathurst, at Appleby assizes, 14th August 1760.

Upon the trial, it appeared that the lands whereon the corn mentioned in the declaration grew, were and immemorially had been CUSTOMARY LANDS, parcel of the manor of Morland, in the county of Westmoreland, and holden of the lord thereof for the time being.

It also appeared that the said manor of Morland, and the appropriate rectory of St. Michael, Appleby, were parcel of the possessions of the PRIORY of Wetherall, in the county of Cumberland, which was one of the larger dissolved monasteries and was vested in the crown by virtue of the stat. 31 H. 8. c. 13. And that the PRIOR of the said priory at the time of the dissolution was and had been time immemorially seised of the said MANOR with the appurtenances, in his demesne as of fee, in RIGHT of his PRIORY; and also of the APPROPRIATE RECTORY of St. Michael Appleby, and the tithes there.

It also appeared that the said manor and appropriate rectory being so vested in the crown, the same was in due manner GRANTED TO THE DEAN AND CHAPTER of the holy and undivided Trinity of Carlisle, in fee; and that they are still seised thereof in fee, in right of their church; and that the present defendant was the CUSTOMARY TENANT and occupier of the said lands whereon the said corn grew, during the time in the

1762.

STEPHENSON
V. HILL.

declaration mentioned; and HELD *the same of the said DEAN AND CHAPTER, as of their said manor of Morland.*

That the plaintiff is farmer of the corn and grain tithes growing and arising within the territories of *Bondgate*, within the parish of *St. Michael Appleby*, aforesaid: and the lands whereon the corn grew, lie in the territories and parish aforesaid.

It appeared that no *tithes* had EVER been yielded or paid for or in respect of the said lands.

It also appeared that ALL the OTHER *customary tenants* of the said manor PAID *tithe*.

It appeared also, that this was the ONLY *customary tenant* belonging to the said manor, which was WITHIN the said parish of *St. Michael*.

Whereupon a verdict was found for the plaintiff, subject to the opinion of the court of *King's Bench* upon the following question—

“Whether the defendant could, in this case, *set up any* PRESCRIPTION which would, by virtue of the stat. of 31 H. 8, exempt him from the payment of *tithe*.”

Mr. *Aspinal* (who argued for the plaintiff, on Tuesday 24th November last) made two questions of it, viz.

First, Whether the tenant can set up *any prescription at all*, to exempt him from the payment of *tithe*:

Secondly, Whether the *facts here stated* are a sufficient foundation for an exemption; even supposing that he might set one up.

The second point, he said, might be taken first.

The fact stated, “That no tithes have ever been paid,” is no exemption, of itself: it is no prescription of exemption. It is *only evidence*: it might have arisen from unity of possession, or other causes.

It will be no foundation for a decree in equity, if it had been *actually found* by a verdict “That they have never been paid.”

Lord

Lord MANSFIELD—the question between you must be
“Whether they *can*, in point of law, prescribe in
“*non decimando*?” for, if they can, the non-pay-
ment is good evidence of it, upon any foot of discharge.

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STEPHENSON
v. HILL.

Mr. ASPINALL—by law, he can *not*. For he must pre-
scribe either in his *own* name, or in the name of the lord of
the manor. But

First, As the defendant is a *layman*, he can *not* prescribe
in *non decimando*, in his *own* name.

Secondly, Neither can he prescribe in the name of the
lord of the manor, He must prescribe now, *as if* it still was
at the time of the dissolution.

A lord can only prescribe as the lands have been holden
by his farmers and tenants at will.

These are stated to be *copyhold lands* parcel of the manor
of Morland, holden of the lord of the manor; NOT saying “At
“the will of the lord.”

Therefore they are CUSTOMARY FREEHOLDS.

Now a lord can not prescribe for his *customary FREEHOLDERS*;
though he may prescribe for his tenants and farmers of co-
pyhold holden at WILL.

These lands in the North are customary freeholds, and pass
by feoffment and livery, and are *not* holden *ad voluntatem do-
mini*. Therefore they are not like copyholds: as appears by
Cartbrow 432. Gale v. Noble—(trial at bar in ejectment for
lands parcel of the manor of Corsham in Wilts.)

The expression “Parcel of the manor” only imports “That
“they lie within the manor.”

The Court will favour the better estate. Therefore, tak-
ing it to be a *customary freehold*, the lord could not prescribe
in *non decimando*, in ANY manner whatsoever.

He can not prescribe as by the *custom of the manor*: for,
the custom of the manor, in general, is stated to be quite
contrary.

The

1762.

STEPHENSON
v. HILL.* V. & Danv.
Abr. 610.
P. 3, 7.
Yelv. 2.
Moore 618.

The case of the Bishop of Winchester, *Crouch v. Friar*, in many books, but most at large in *Cro. Eliz.* 784.* will be urged against me. But supposing that to be law, yet the lord of the manor did not prescribe against himself as appropriate rector. He was founder; and therefore a stipulation might be presumed: whereas here, the dean and chapter have had both the manor and the tithes, in themselves. And that was a prescription for *copyholders*; and the custom was prior to the parochial right of tithes; which first commenced by the council of *Lateran*, in the time of king *John*.

Nor can he be exempted by unity of possession, *Unity of possession* is a distinct thing from *prescription*.

Besides, here he can not rely upon unity of possession; because it has been in other hands from time immemorial.

And copyholders at will can not be exempted by prescription.

Mr. Clayton, for the defendant—no tithes have been ever paid for these lands, from 31 H. 8. And after this length of time, a legal exemption will be *presumed*.

This was a great abbey, that came to the crown by the stat. of H. 8. And the manor was in the prior, in right of his priory. These lands were therefore discharged from payment of tithes, at that time: and their discharges from tithes are preserved to the crown and their grantees and assignees, by 31 H. 8. in the same manner and to the same extent as when they were in their hands.

SPIRITUAL persons may prescribe in *non decimando*: and so may their farmers and tenants; and even their copyholder of inheritance. 1 Ro. Abr. 653. pl. 2, 3, 4, 5. 2 Co. 44. Bishop of Winchester's case: *Cro. Eliz.* 216, 475, 511, 512, 704, 784. Moore 219. Branch's case. Yelv. 2. *Croucher v. Fryar*. Ney† 132. anonymous; And customary estates of inheritance may be discharged in the same way; for the freehold is in the lord.

* *Crouch v. Fryar* is cited there.

These customary estates in the North are not freeholds; but copyholds; and in the nature of tenancies at will. They never pass by *feoffment*, but by *grant*; and often by *grant and admittance*: but an *alien* can not maintain an *ejectment*; till admittance; for the estate does not pass to him, as it does to the heir by descent.

Though

Though many other parts of this estate have paid tithe, yet there may be a prescription for a discharge for part: a prescription may be for a single part, alone. But this is the only tenement that lies in this particular parish,

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v. HILL.

As to the *unity of possession*—Supposing it liable to a doubt, yet you may prescribe, “That the prior held it discharged ‘time immemorially;’” *Priddle v. Napper*, 11 Co. 14. and the case of *Wright v. Gerrard and Hildersham*, agrees “That ‘an unity and a perfect discharge may stand together;’” and cites 11 Co. 14. as truly saying so. 2 Keb. 459. * *English v. Johns*. That a unity of possession, and a perfect discharge from tithes, may stand together, can not be disputed.

* This was a plea of discharge by reason of the unity. But it was adjourned.

Here, none have ever been paid. Therefore the Court will presume a legal discharge.

This is a unity, time out of mind: which is a sufficient discharge, after so long a time.

The prior was *seised* both of the rectory and of the land. It was not necessary to be in actual possession of the lands. *Hob. 306. Wright v. Gerrard and Hildersham*. 11 Co. 14. *Priddle and Napper's case*. 2 Co. 48. The archbishop of Canterbury's case.

These *customary tenures* are not freeholds: the timber, the mines, are in the lord. Therefore it is the common case of copyholders: which has been determined over and over; particularly in *Cro. Eliz. 784*. in the case of *Crouch v. Fryar*.

It is enough, if we are discharged in any manner.

Mr. *Aspinall*, in reply—It shall not be presumed † That tithes are not payable, because they have not been paid.

The case I mentioned is a prescription for the bishop himself, his farmers, and tenants at will.

The *customary estates* are not copyholds: the freehold is in the tenant. 1 Salk. 365. *Crouther v. Oldfield*. They pass by the deed, † not by the admittance.

Here was no unity of possession in the prior, of the rectory and of the lands. *Moore 528. Benson v. Trott. Moore 219. Branch's case. Cro. Eliz. 704. Crouch's case.*

† But it seemed agreed, that in every manor, there is either an admittance or a licence; and every thing is in the lord, that custom has not taken out of him.

Here,

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Here, the tithes arise, upon leasing out the lands. The *unity ceases*, when the prior ceases to hold *both* lands and rectory together.

Either by *prescription* or by *unity*, the lands ought to be charged.

Uterius Concilium.

THIS CAUSE now standing in the paper for further argument—Mr. Solicitor General (*Sir Fletcher Norton*), who was for the plaintiff, said that the particular customs of the manor (which had been inquired after, in the course of the former argument) were not yet sent up.

LORD MANSFIELD—What signify the customs? clearly, the *freehold is in the LORD*.

Sir Fletcher Norton acknowledged that he had a great difficulty to get over; it being stated in the case itself, "That this was the *only* customary tenant belonging to the manor, which was within this parish."

LORD MANSFIELD and Mr. Justice DENISON said it was a settled point, "That the *freehold is in the LORD*." And Lord Mansfield added, that this is rather *stronger* than the case of copyholds: for, copyholders had acquired a permanent estate in their lands, *before* these persons had done so.

Mr. Justice
Foster was not
present.

Per Cur'—Let the *posse* be delivered to the defendant in order for a JUDGMENT of NONSUIT,

(1 Black. Rep.
353. S. C.)

Fenton *versus* Emblers, Executor of May,

Agreement to
leave money by
will, need not
be in writings,
though uncer-
tain as to the
time of perfor-
mance.

THIS was a special case, reserved at *nisi prius* at the assizes at *Abingdon*.

It was an action upon the case upon *assumpsit*, against *Emblers*, as representative of one *May* deceased.

The declaration contained six counts; and upon the first four counts, there was a verdict for the plaintiff; and for the defendant, on the sixth. The only doubt was upon the fifth count: which fifth count was, "That the said *William May*,

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V.
EMBLEY.

" *May*, in consideration that the said *Sarah* (the plaintiff)
 " would be and become the *house-keeper and servant* of the
 " said *William*, and take upon herself the care and manage-
 " ment of his family, &c; and perform the same as long as
 " it shall please the said *William* and *Sarah*; undertook and
 " promised to pay wages to the said *Sarah* at and after the
 " rate of six pounds for one year; and ALSO BY HIS LAST
 " WILL AND TESTAMENT to give and bequeath to the said *Sarah*
 " a legacy or annuity of 16 l. by the year, to be paid and pay-
 " able to her yearly and every year from the day of the de-
 " cease of the said *William* for and during the term of her
 " natural life; and that she the said *Sarah*, confiding in the
 " said promise, entered into his service, and became his
 " house-keeper, &c, and continued so for three years and
 " fifty-nine days: but that he the said *William* had not per-
 " formed his said agreement, and did not leave her such le-
 " gacy or annuity, &c."

It was stated in the case, that it appeared upon the evi-
 dence, that there was such an agreement between the said
William May and the plaintiff; but that it was by PAROL,
 and NOT in writing.

That the plaintiff, in performance of her part of the said
 agreement, did enter into the testator's service, as house-
 keeper, &c; and continued in such service till the testator's
 decease.

That the testator did not give her by last will, or otherwise,
 the said annuity of 16 l. per annum, or any other annuity.

A verdict was found for the plaintiff on the fifth count,
 for 220 l. subject to the opinion of the court; first, whether
 the evidence was sufficient to maintain the action upon it;
 secondly, whether the agreement therein set forth ought not to
 have been in writing.

Mr. Hall, for the defendant, objected—First, that this
 evidence is not sufficient to prove the special agreement laid
 in the fifth count; which ought to be proved precisely. He
 said there was a material variance between the case laid in the
 declaration, and the case proved. For, the case laid in this
 fifth count in the declaration is not a hiring for a year; because
 either party was at liberty to put an end to the contract: but
 the case proved is a general hiring; which, in construction
 of law, is a hiring for a year.

Secondly, that by the statute of frauds, (29 C. 2. c. 3.
 § 4.) this agreement, as it was not to be performed within a
 year;

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year, ought to have been reduced into WRITING. The statute says "No action shall be brought, whereby to charge any executor or administrator, upon any agreement that is not to be performed WITHIN the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in WRITING, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

This is a promise of a legacy, by an instrument revocable at pleasure. It would be extremely inconvenient to establish promises of this kind, not reduced into writing. The present agreement could not be performed, on May's part, within a year: for a whole year from his death was to elapse, before the annuity or any part of it would become payable.

He cited 1 Ld. Raym. 316. *Smith v. Westall*; and relied on a case of *Reynolds v. Spencer Cowper*, in *Scacc*, in 1726. *Viner*. Titi contract and agreement, p. 524. § 47. (which case he said he had ordered to be searched, and found it to be so;) where the rule laid down is—"That a *parol* promise to be performed upon a contingency which may or may not happen within a year after the making, is void, with in the statute of frauds."

Mr. Stowe, *contra*, for the plaintiff, insisted first; that the evidence does support the declaration; and that the fact is precisely proved.

Secondly; that it was not necessary that this agreement should be reduced into writing. The action is brought for May's not having done what he ought to have done in his life-time: so that it might and should have been done within the year. This consideration is sufficient, at common law, to raise a promise. The statute of frauds does not affect this case. Mr. Hall's doctrine would overturn all the cases upon verbal general contracts of matrimony, where the defendant did not actually promise "To marry within the year."

He cited two cases in point: viz. 1 *Salk*. 280. anonymous. P. 5 *W. & M. C. B.* and the case of the promise to pay 20*l.* on marriage, mentioned in 1 Ld. Raym. 316. 317. *Smith v. Westall*.

Mr. Hall, in his reply,—Observed, that this is a method of binding the assets, without making a will.

Lord

LORD MANSFIELD—There is only that case in the *exchequer*, in 1726, that can make the least doubt. By the other cases, it seems settled,

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v.
EMBLEY.

There is nothing in the objection about his leaving it by *his will*: for, there is nothing *testamentary* in a promise "To leave at his death."

The case in 1726, in the *exchequer*, can not be rightly represented to us: for, as it is represented, one of the two resolutions, *viz.* that upon the statute of limitations, is wrong to the last degree, and obviously so to every body. It is represented to have been there resolved "That that statute bars eventual rights, from the time of the *promise made*, (after the six years are elapsed:)" whereas no one can doubt but that the bar only takes place from the time when the *right accrued*, and not from the time of *making the promise*.

Mr. Justice DENISON—The statute of frauds plainly means an agreement NOT to be performed within the space of a year, and *expressly and specifically so agreed*: A CONTINGENCY is not within it; nor any case that *depends upon contingency*: It does not extend to cases where the thing only MAY be performed within the year: and the act can not be extended further than the words of it. *Skinner* 353. † *Peter v. Campton*, proves the distinction of a contingency, as I have stated it, as fully and clearly as possible. It was an action upon the case upon an agreement, in which the defendant promised, for one guinea, "To give the plaintiff so many at the day of his marriage." The question was, "If such agreement ought to be in WRITING:" for, the marriage *did not happen within a year*. The Chief Justice (HOLT, before whom it was tried,) advised with all the judges, and by the greater opinion (for there was diversity of opinion, and his own was *contra*) "Where the agreement is to be performed upon a contingent, and it does not appear within the agreement, that it is to be performed AFTER the year, there a note in writing is NOT necessary; for, the contingent MIGHT happen within the year: but where it appears by the whole tenor of the agreement, that it is to be performed after the year, there a note is necessary; otherwise, NOT."

† This case had been mentioned by Mr. Justice Wilmot: and it seems to me to be the very case cited by Mr. Northey, and discussed by Ld. Ch. J. Holt, in the case of *Smith v. Westall*, 1 Ld. Raym. 319, 317.

† Mr. Justice WILMOT concurred; and agreed with the reason of the case in *Salk*: 280. "That by possibility, the ship might have returned within the year; though by accident it happened that it did not: and the clause in the

† Mr. J. Foster was absent.

"statute

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"statute only extends to *such* promises, where, by the *express* appointment of the party, the thing is NOT to be performed within a year."

Lord MANSFIELD—As to the *variance*, there is nothing in that objection.

Let the *posse* be delivered to the plaintiff.

Appleton *versus* Smith.

In an action of trespass for entering plaintiff's dwelling house, making great noise, till defendant compelled plaintiff to give him a promissory note; jury giving only a guinea damages, no more costs than damages allowed.

THE question was, "Whether the plaintiff should have *"FULL costs, or no more costs than damages;"* upon the following case.

This was an action of *trespass vi et armis*, for breaking and entering the plaintiff's dwelling house, and there making a great noise and affray and disturbance, and continuing it for two hours and UNTIL the plaintiff and his father, Richard Appleton the elder, and one Christopher Atkins were compelled and obliged to give and did give to the defendant their promissory note for 6*l.* 17*s.* payable to him the said defendant. The jury found for the plaintiff; and gave him a guinea damages.

Mr. Serjeant Nares insisted, on behalf of the defendant, that the plaintiff could, in this case, have *no more costs than damages*.

For that, by the statute of 22 & 23 Car. 2. c. 9. § *ult.* "In all actions of trespass, assault, and battery, and other personal actions, wherein the judge, at the trial of the cause, shall not certify upon the back of the record that an assault and battery was sufficiently proved, or that the freehold or title was chiefly in question; and the damages found are under 40*s.* the plaintiff shall recover no more costs than damages."

This is a *general action of trespass*: and there is *no certificate* from the judge.

The circumstance of "Continuing the noise and disturbance *until* these three persons gave their note for 6*l.* 17*s.*" is only *aggravation*.

There

There are two cases in point: viz. *Blunt v. Mither* in C. B. 1 Sir J. S. 645. (called *Blunt v. Miller* in Gilbert's cases in *Scacc.* 197.) and *Boiture v. Woolrick*, in 1 Ld. Raym. 566.

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APPLETON

SMITH.

The case of *Swinstead v. Lyddal*. 1 Salk. 408. is also a case similar to the present. It was an action of trespass and false imprisonment for such a time, and *quousque* he paid 11s. It was holden "That the *quousque* was not the cause of action: but the imprisonment: the *quousque* was only matter of aggravation."

And there was a late case of * *Howard v. Parr*, from * Or Ford v. *Staffordshire*, which was an action by a schoolmaster, for disturbing him in the possession of his house, and continuing such disturbance, &c; the verdict was for less than 40s. and there was no certificate: and the plaintiff could have no more costs than damages.

Mr. Serjeant Davy argued *contra*, for the plaintiff.

The question in this case is, "Whether the FREEHOLD 'could come in question:' for if it could not, then the judge could not certify. And the settled construction is, "That this statute is restrained to those cases in which the judge 'can certify.'"

Where the damage is *consequential*, under a "Per quod," it is indeed only *aggravation*. The cases cited against me are, all of them, such cases of *aggravation* by reason of *consequential* damages.

Where there is an *assortavit*, the title can never come in question: nor in actions of mere assault and battery. For this statute of 22, 23 C. 2. c. 9. § ult. doth not extend to all trespasses, but only to such trespasses *quare clausum fregit*, in which the freehold of the land may probably come in question, and so it is determined expressly, in 3 Mod. 39. *Barnes v. Edgard*; and in *Smith v. Batterton*, there cited, (and reported in Raym. 487. and Sir T. Jones 232.) and in *Thompson v. Berry*, in C. B. reported in 1 Sir J. S. 551. all the cases apply to this general rule.

† It was so settled in the case of *Smith v. Clarke*, P. 13 G. 2. B. R.

LORD MANSFIELD—THIS case depends upon the words, "And UNTIL the plaintiff, &c. were compelled, &c.:" which words are barely an *aggravation* of the defendant's continuing in the house; and nothing more.

1762.

APPLETON

SMITH.

On the *first* words, (*viz.* "Breaking and entering the house,") the freehold *might* have come in question.

Mr. Justice DENISON concurred, "That they are *only* words of aggravation; which need not even be answered in a plea."

* Mr. Justice Foster was absent.

THE * COURT directed the master to tax the costs at A GUINEA ONLY.

☞ See this subject relating to the recovery of *full* costs, or the not obtaining any *more costs than damages*, very clearly explained by Lord Chief Baron Gilbert, in delivering the opinion of the court of *exchequer*, in the case of *Reeves v. Butler*, H. 12 G. 1. where he compares and interprets the several statutes upon which cases of this kind depend; and vindicates the reasoning and resolutions of the judges upon 22, 23 C. c. 9. § *ult.* Amongst the modern resolutions which he mentions, he reports the case of *Blunt v. Miller* (as he calls the defendant) in the very same words with Sir John Strange; excepting a gross misprint of "*decreed*," instead of "*denied*," and a year's antedate of the time, (M. 11 G. 1.) *Gilbert's Equity Cases*, 195 to 200.

(1 Black. Rep. 355. S. C.)

Thursday, 28 Jan. 1762.

Ingle *versus* Wordsworth, et al.*

In Replevin.

One of two defendants in replevin, cannot have his costs upon acquittal.

ONE of the defendants having been acquitted by verdict (on a plea of "*non cepit*,") and there being no certificate of the judge "That there was a reasonable cause for making him a defendant; Mr. Norton moved, on his behalf, upon Saturday 23d May 1761, that the plaintiff in replevin might shew cause why the master should not tax the defendant's costs (pursuant to 8, 9 W. 3. c. 11. "For the better preventing frivolous and vexatious suits,") as if a verdict had been given against the plaintiff, and all the defendants acquitted. † All the other defendants had avowed: and issue was taken upon a right of common, which was found for the plaintiff in replevin, *viz.* "That he had right of common."

† V. sect. 1.

The master had a doubt whether the action of REPLEVIN was within the statute of 8, 9 W. 3. c. 11. § 1. which specifically names *only* actions of *trespass*, *assault*, *false imprisonment*, and *ejectione firmæ*.

On

On Wednesday 10 June 1761, Mr. Clayton shewed cause; and insisted, on behalf of the plaintiff in replevin, "That this defendant was not intitled to any costs."

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INGLE

WORDS WORTH
and Another,

REPLEVIN is not within the act of 8, 9 W. 3. c. 11. And it is clear, that before that act, a plaintiff should not pay costs to a defendant who was acquitted; provided he succeeded against any one of the defendants in the action.

There are no direct instances indeed in REPLEVIN, determined since the statute: but there are in *similar cases*; as *trover* and *nuisance*. And the act ought to be construed *strictly*, being a *penal law*.

The case of *Marriner v. Barret* (or *Barwick*) P. 1 G. 2. was in *trover*. It was there holden that a defendant who was acquitted was not intitled to his costs; because not within the words of the act: and costs were there considered as a *penalty*.

In the case of *Dibben v. Cook et al.* M. 8 G. 2. B. R. for a *nuisance*, it was holden that the act only extended to trespasses *vi et armis*.

In 1 Salk. 194. *D^{na} Regina v. Danvers et al.* On an information, one defendant, being acquitted, prayed costs, on the equity of this act; but was denied.

Mr. Norton, *contra*, in support of his rule, contended that the acquitted defendant was intitled to his costs. The act of 8, 9 W. 3. c. 11. is a *remedial law*; and no otherwise penal than as it gives costs: and so the title speaks it; "An act for the better preventing frivolous and vexatious suits." And this is certainly frivolous and vexations, in the opinion of both judge and jury: for, the one has not certified "That there was a reasonable cause to make him a defendant;" the other has acquitted him.

A *replevin* is within both the *letter* and the *spirit* of this law. It is properly within the word "TRESPASS:" and the act uses the word "*plaint*," with a particular view to this species of trespass. And it is within the *spirit* of the statute, certainly; because, otherwise, the plaintiff in replevin might add 20 or 30 defendants, for the sake of harrassing and vexing them frivolously.

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and Another.

He acknowledged the case of *Dibben v. Cooke* to have been as stated, except as to this law being treated as a *penal law*; which Lord *Hardwicke* (as Mr. Justice DENISON confirmed) then * declared, it was *not*: but he said, it was determined upon *too narrow* principles.

* Lord Hardwicke's expression appears by my *own* notes to have been as follows—"And though in my own mind I am not satisfied that costs are in the nature of a penalty; (for they seem to me rather in the nature of a satisfaction;) yet I think we are not authorised to determine contrary to the course of all these former resolutions." He said this upon citing the case of *Coan v. Bowles*, for the rule there laid down "That statutes concerning costs are to be construed *strictly*"; and he adopted the principle the court went upon; though he could not come into the *reason* they there gave for it.

However, that was *not* an action of REPLEVIN: and there is no determination of this sort, in a case of REPLEVIN; which seems to be within the very word "*plaint*."

Mr. *Clayton* said he had forgot to mention a very material case, in which it was determined that the avowant in replevin *can not* have his costs, upon error brought by the plaintiff in replevin and judgment affirmed. It is in *Carthwait* 179. *Coan v. Bowles*. The ground of the resolution is "That he is *not within the LETTER* of the acts; and the principle there laid down was that these acts are to be taken *strictly*, and *NOT extended beyond the letter*, because costs are *in the nature of a PENALTY*."

Lord MANSFIELD—If no reason had been given, the authority might have had more weight: but, to be sure, the reason is a FALSE one.

THE COURT took time to consider of it—

And now Lord MANSFIELD delivered their opinion.

We have thought of this case. We had a strong bias to have given the defendant his costs, *if* it had been possible; because it is agreeable to *natural justice*, that he should receive them, if there was no reasonable cause for making him a defendant.

But the matter is *too fully settled* to be *now* gone into, upon reasons at large.

The statute speaks *generally* of actions of TRESPASS; and does not particularly *specify* any actions of trespasss that are not trespasses *quare vi et armis*. But this is a case of REPLEVIN; which can not have that latitude of construction put upon it, which Mr. *Norton* has contended for, consistent with the settled cases.

It

It has been so settled and established, "That *this* act and "all acts that give *costs*, are to be construed STRICTLY."

1762.

INOLE

V.
WORDSWORTH
and Another.
• V. 2 Sir J.S.
1005, 1006.

The case of * *Dibben v. Cooke* is not so fully reported in Sir *John Strange*, as it really passed. Lord *Hardwicke* gave the solemn judgment of the court; and declared it to be then settled "That all the statutes relating to costs are and ought "to be construed *strictly* and according to the letter." And he declared, "That actions of trespasss *upon the case* could "not be construed to be within this act of parliament." And he gave reasons for it; and added that upon inquiry into the practice of the common pleas, it appeared that the word trespasss was there taken only to relate to trespassses *vi et armis*. And *trespasss upon the case* is nearer to *trespasss vi et armis*, than REPLEVIN is; which differs, in many things, from a mere action of trespasss.

There is another authority, very strong; which is on the writ of error, in the exchequer chamber, on 27 *Eliz. c. 8*. It is in 2 *Ro. Rep.* 434. (*Farnell* plaintiff, in second deliverance) which determines a replevin *not* to be an action of trespasss within that act; and that therefore a writ of error would not lie in the exchequer-chamber, upon a judgment in replevin in *B. R.*

The argument in the case of *Dibben v. Cooke* was "That "actions of trespasss upon the case had been holden to be "within the proviso of the statute of LIMITATIONS; though "as much excluded *there* as they are here, by so many *other* "actions being *specified* in that † clause, (even actions on "the case for words) and *this* omitted.

† V. 2 J. 1. c. 2
16. § ult.

But *that* proviso is to be construed *liberally*; *this* statute is to be taken *strictly*.

I consider this as a point *so fully settled*, as not to be got over, upon any reasoning *at large*.

THEREFORE the RULE must be DISCHARGED.

Sone *versus* Ashton.

THIS was an action of debt, for 100*l.* brought against the marshal of the *king's bench*, on the land-tax act of 33 *G. 2.* for acting as a *commissioner of the land-tax*, for the county of *Surrey*, without being properly qualified.

Friday, 29 Jan.
1762.

Marshal of the
king's bench,
may act as a
commissioner of
the land tax un-
der the qualifica-
tion of his office.

E 3

Upon

1762.

SONE V.
ASKTON.

Upon "*nil debet*" pleaded, and issue joined thereon, the cause went to trial, before Lord Chief Justice *Willes*, at the summer assizes 1761, for the county of *Surrey*: when a verdict was, by consent of both parties, given for the plaintiff for 50*l*, but subject to the opinion of the court upon the following case,

That the defendant, claiming a qualification as MARSHAL of the king's bench, had acted as a commissioner of the land-tax for the county of *Surrey*, on the 21st of August 1760, being the time laid in the first count of the declaration.

That the 10500*l*. mentioned in an act of parliament made in the 27th year of the late king *George* the second, intituled "An act for re-vesting in the crown the power of appointing the marshal of the *marshalsea* in the court of king's bench, &c." had been paid to the mortgagees, and the prison rebuilt, in pursuance of the act.

That 200*l*. a year, part of the profits of the office of marshal of the king's bench prison, arise from letting rooms in the said prison.

That the marshal has, as belonging his office, a house to live in; with a garden and a piece of land belonging thereunto, and two houses for his officers to live in; rebuilt also according to the directions of the said act of parliament.

That in the year 1759, he was assessed to the land-tax in the county of *Surrey*, as follows viz. "For the prison of the king's bench, house, lands, garden, and common fide, 300*l*: for his office and perquisites, as marshal 200*l*;" in all 500*l*: which assessment was, on an appeal, reduced to 300*l*; viz. "For the prison of the king's bench, prison-house, land, garden, and common fide, 250*l*; for the office and perquisites as marshal 50*l*."

That the defendant insisted on no other qualification, save what arose to him as aforesaid.

THE QUESTION submitted to the Court, was—"Whether the defendant is liable to the penalty demanded in the first count in the declaration."

Mr. *Coxe* for the plaintiff, endeavoured to shew that the marshal had no qualification, either from the prison, house, land, garden and common fide, or from his office and perquisites

quisites as *marshal* to act as a commissioner of the land-tax. For, the qualification required by the land-tax act must arise out of LANDS and TENEMENTS, not out of *offices or perquisites*. The words of the act are plainly confined to lands and tenements: the expressions of "*Lease-hold, copy-hold, ground-rents, &c.*" are not applicable to OFFICES or PERQUISITES.

1762.

SONE V.
ASHTON.

And the *free-hold* of the prison, house, lands, garden and common sive, is in the CROWN: they are the crown's property. The marshal has no FREEHOLD in the *prison, house, lands, garden, &c.*; though he has indeed a qualified freehold in his OFFICE.

To prove "That the *free-hold* of the prison, house, lands, garden, &c. is in the crown," he relied upon the statute of 27 G. 2. c. 17. which recites that of 8, 9 W. 3. c. 27. and (by its second clause RE-VESTS the prison and the scite thereof, and the ground and appurtenances thereunto belonging, and the power of granting the custody of the said prison and the office of marshal, *in the crown*, for ever, unalienably. And he has only a qualified free-hold even in his OFFICE.

The same act (§ 5.) appoints the defendant Mr. Ashton, marshal, so long as he shall behave himself well in his said office: and (§ 8) makes him *removeable* by rule or order of this court, for misbehaviour or neglect of duty. And he stands only taxed at 50*l.* for the OFFICE, exclusive of the prison, house, lands, garden, and common sive.

Mr. Lee, *contra*, for the defendant, said the case itself was so plain, that no argument could make it plainer. That the words "*Lease-holds, copy-holds, ground-rents, &c.*" are to be applied to the subject matters of them *respectively*, though not jointly. That the OFFICE is granted to the defendant; and the prison, house, lands, garden, and common sive, are annexed and incidental and naturally and necessarily belonging to it, and pass with it as being so incidental to the office. That OFFICES are qualifications within this act; and that it is admitted "That the defendant has a qualified free-hold in this office;" which is sufficient.

*V. Inst. 4117.
c. 12. (relating
to the chief ba-
ron's office.)

Mr. Coxo replied, that his free-hold is confined to the OFFICE: he has no free-hold in the *prison, &c.*, or in any lands or tenements.

LORD MANSFIELD—Is not his office a TENEMENT? and, he has a qualified freehold in it. He is qualified, both,

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SONE v.
ASHTON.

within the *words*, and within the *intention* of the statute. Is not the master of the rolls qualified for the houses which belong to him in the right of his office? I know, that the master of St. Catharine's has sat in parliament, under the qualification of his office.

Per Cur'. (Mr. Justice Foster absent,)

Let the *posse* be delivered to the defendant.

(1 Black. Rep.
357. S. C.)
Thursday 4 Feb.
1762.

Fair-claim, ex dimiss' Fowler et al. *versus*
Sham-title.

In Ejectment.

Whether one claiming as lord by escheat shall be admitted defendant in ejectment, brought against tenant in possession, by the lessor of one claiming as heir at law.

UPON Monday 23d of November 1761, Mr. Asturst supported by Mr. Serjeant Nares, and Mr. Norton and Mr. Morton, moved (on behalf of the plaintiff,) to discharge a rule, whereby it was ordered that Granville, earl Gower and Thomas Gifford, esq; landlords of the tenant in possession of the premises in question, should be joined and made defendants with the said tenant, if he shall appear: and the said earl and Thomas desiring that if the said tenant shall not appear, that they may appear for themselves; and consenting, that, in such case, they will enter into the common rule "To confess lease, entry, and ouster in such manner as the said tenant ought in case he had appeared;" leave is given to the said earl and Thomas, pursuant to the late act of parliament, if the said tenant shall not appear, to appear by themselves; and, upon their entering into such common rule, to become defendants in the stead of the casual ejector, and to defend their title to the said premises, without the said tenant. The plaintiff, nevertheless, is at liberty to sign judgment against the casual ejector: but execution thereon is stayed, until the court shall further order.*

N. B.

* There was a *Rule*, where-
by Sir Hugh Eriggs and lord Bradford (lords of other manors, who also claimed by escheat,) were admitted defendants exactly in the same manner as lord Gower and Mr. Gifford were by this rule.

Their objection to the rule was "That earl Gower and Mr. Gifford had never been in possession": (of which fact they had affidavit,)

This rule must therefore, as they said, have been obtained by surprise: for that the act of parliament of 11 G. 2. c. 19. § 13. was made for the security of landlords who had been in possession, and whose tenants neglected to give them notice of ejectments.

And

And they cited a "case, a few terms ago, where such a rule as this was made, "To shew cause," only; and on this same cause being shewn, (*viz.* "That neither party had been in possession") the said rule was discharged. So HERE, the earl and Mr. Gifford claim by ESCHEAT, on the death of *Elizabeth Lewison*; and the plaintiffs claim as heirs at law to her: but neither have been in possession.

1762.

FAIRCLAIR
ex dimiss.
FOWLER & AL.
v.
SCAMPTON.

* The case was
Dec on the de-

mise of *James Gore v. Roe*. On the last day of Hilary term 1761, upon the affidavit of *William Scarisbrick*, the conditional rule was obtained on Mr. *Tates*'s motion, "To make the said *William Scarisbrick*, (who claimed the premises, as purchaser under the heir at law of *Thomas Gore* who died seised in fee,) a defendant with the tenant, if he appeared; or without him, if he refused."

Upon the first of May, in *Easter* term following, Mr. *Clayton* obtained a rule, to shew cause why the above rule "For making the said *William Scarisbrick* defendant" should not be discharged, with costs.

Upon the sixth of June, in the subsequent Trinity term, cause was shewn; and upon hearing counsel for both parties, the said rule was discharged, but without costs.

James Gore claimed to be the true heir at law to *Thomas Gore*; but the possession had been in lessees under a lease granted for ninety-nine years, by *Thomas*; which lease was recently expired.

All the tenants but one have attorned to the lessors of the plaintiff: and that one tenant did not appear.

They cited as a case in point to prove "That the Court have no jurisdiction to admit any person to defend an ejectment instead of the tenant, except one who is in some degree of possession" — 2 *Barnes*, p. 28. of appendix, *M. 29 G. 2. C. B. Roe*, ex dimiss. *Leake and others*, v. *Doe*.

THE COURT gave them a RULE to shew cause.

Upon Friday, 27th of November 1761, Mr. *Harvey*, Mr. *Thurlow*, Mr. *Aspinall*, Mr. *Madocks*, and Mr. *Stowe* (on behalf of earl *Gower* and Mr. *Gifford*) shewed cause why the above-recited original rule should not be discharged; and they argued thus.

The lessors of the plaintiff claim as heirs: we claim by escheat of a copyhold, *pro defectu heredis*; not for a forfeiture for want of an heir's coming-in. If there be an heir, we claim nothing. We therefore only desire to have the cause tried.

A lord of a manor has such a seisin at law, of an escheated copyhold, that the occupier is his tenant at will, and the lord may distrain for the rent; and though perhaps the occupier may not be liable to the penalty of the triple rent, yet the lord may avow upon him for the single rent.

The

1762,

FAIRCLAIM
vs. dimitt.
Howles & al.
v.
§§AMTILES

The lords by escheat claim upon the same foot as if they were *heirs* to the deceased tenant: and the heir might be admitted to be made defendant; though he had never received rent. The estate originally belonged to the lords, and moved from them, and reverts to them for want of heirs of the tenant; and we are neither strangers, nor collude with the tenant.

The statute of 11 G. 2. c. 19. § 11, 12, 13. is to be extended further than to those cases only where the rent has been actually received: it extends to landlords *de jure*, as well as to landlords *de facto*. A PROBABLE CAUSE of claim is sufficient to intitle the landlord to be made defendant; his real title is to be tried hereafter, in the cause.

Before the statute, the landlord had a right, by law, to be joined with the tenant: and the statute enforces this right. And it must be construed liberally, to prevent the mischief which occasioned the making of it.

But the plaintiffs come too late, in this application. They have stopped themselves, by proceeding after our rule: they have proceeded even so far as to the nomination of a special jury; and then they gave notice "That they should not try the cause." So that they have acknowledged us as tenants.

The case of *Gore v. Roe* or *Scarisbrick* was a case where no rent had been paid by any body: and *Scarisbrick* had purchased a pretended title. But the lord of this manor is *dominus terræ*, and within the words of the act.

As to the case in *Barnes*—

LORD MANSFIELD—I do not understand that note. It puts the refusal of the motion, upon want of jurisdiction, and a case cited by Serjeant *Davy*. Whereas, in *ejectments*, the court can never want jurisdiction to prevent the plaintiff from recovering without a proper trial. An *ejectment* is the creature of *Westminster-Hall*, introduced within time of memory; and moulded gradually into a course of practice, by rules of the courts. The same authority which brought it thus far, may certainly carry it to a higher degree of perfection, as experience happens to shew inconveniences or defects. The act of 11 G. 2. was drawn and brought in by Sir *John Strange*: the provisions therein, relative to proceedings in *ejectment*, were either to enforce a right practice, or occasioned by some case contrary to the general sense of the bar, which the legislature virtually condemns as erroneous.

roneous. And as to the precedent cited from *Strange* 1241, it is a total mistake: there is not a syllable in that case, about a mortgagee being refused to be admitted to defend as landlord.

The counsel for the plaintiff (who had moved to discharge the present rule) argued that these *potential landlords* can not be within the stat. 11 G. 2. c. 19. For, "*such*" landlord must be a landlord to whom the tenant is *obliged to deliver the declaration*.

The act, they said, was made to *defend an actual possession*, only; not to *give* one. *Before* the act, no man could have come and been admitted to defend *with or instead of* the tenant; nor have put himself in possession: and the act only lets in the landlord, to prevent the tenant from giving up the possession.

The solid construction of this act is "That there being "no possession, he could be no landlord." And the case of * *Goore v. Scarisbrick*, went upon this principle; and was fully argued and discussed. It was moved upon affidavit of *Scarisbrick's* claim; which was a purchase from the heir at law of the reversioner, another person claimed to be heir at law. The rule was discharged. No rent had ever been paid under the lease, in that case: and the Court observed "That "the tenant would *not* have been liable to the penalty for "not delivering the declaration to him."

* Vide ante p. 1291, in margin.

There is no privity between the lord by escheat, and the tenant.

There must have been *rent actually received*; (except in cases of mortgagees after forfeiture, or such like:) but even an *heir*, who has *never received rent*, can not be let in to be made defendant, under this act.

As to any proceedings subsequent to their rule—

The attorney for the plaintiffs might not know of this rule; for, it was obtained only upon the last day of the term: and we could not apply sooner, to get it discharged. Besides, he only attended the *naming* of the forty-eight of the special jury. No issue was joined: they never were accepted as tenants.

Moreover, we claim as *HEIR*: and a lord claiming by escheat is intitled to no favour, where another claims as *heir*.

Lord

1762.

FAIRCLAIM
ex dimiss.
TOWLER & al.
v.
SHANTILES

Lord MANSFIELD—it is a point of great consequence : and I am glad that it will be settled.

AN EJECTMENT is an ingenious *fiction*, for the trial of titles to the possession of land.

In *form*, it is a trick between two, to dispossess a third by a sham suit and judgment.

The artifice would be criminal, unless the Court converted it into a *fair* trial with the *proper* party.

The control the court have over the judgment against the casual ejector enables them to put any *terms* upon the plaintiff, which are *just*. He was soon ordered to give notice to the tenant in possession. When the tenant in possession asked to be admitted defendant, the court was enabled to add CONDITIONS; and therefore obliged him to *allow* the fiction, and go to trial upon the *real merits*.

It might happen, that the tenant in possession was a mere farmer at will. He was bound to give notice to his landlord.

The *same reason*, of a fair trial with the proper party, required the landlord to be admitted defendant; *with* the tenant, if he was amicable; or *without* him, if he, contrary to the duty of his relation, should betray the cause.

There can be no ground for admitting the landlord to be a co-defendant, which does not hold to his defending *alone* in case the other abandons.

The plaintiff ought not to recover by collusion with one, to the *prejudice* of a *third*: he ought not to recover, without a trial with the *person* interested in the question and affected by the judgment.

Every point relative to the proceeding in ejectments is of consequence. I am glad we have this *occasion*.

There are two matters to be considered;—

First, Whether the term "*landlord*" ought not, as to *this* purpose, to *extend* to *every* person whose title is connected to and consistent with the possession of the occupier, and divested or disturbed by any claim adverse to such possession; as

in

in the case of remainders or reversions expectant upon particular estates: secondly, whether it does not extend, as between two persons claiming to be landlords *de jure*, in right of representation to a landlord *de facto*; so as to prevent either from recovering by collusion with the occupier, without a fair trial with the other.

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FAIRCLAIN
ex demiss.
FOWLER & S.
v.
SHANTYLL.

Where a person claims in *opposition* to the title of the tenant in possession, he can in *no* light be considered as landlord; and it would be unjust to the tenant, to make him a co-defendant: their defences might clash. Whereas, when there is *privity* between them, the defence must be upon the same bottom; and letting in the person behind, can only operate to prevent treachery and collusion.

It is no answer, "That any person affected by the judgment may bring a *new* ejectment": because there is a great difference between being *plaintiff*, or *defendant*, in ejectment.

THE COURT did not, however, give any opinion then; but took time to consider of it, till the second day of the present Hilary term 1762; and ordered that notice should be given to the tenant in possession.

On the said second day of Hilary term 1762, the tenant in possession, having been served with notice as above, did not appear by any counsel.

Mr. Justice DENISON proposed to search what was the practice in the court of *Common Pleas*, since the act.

LORD MANSFIELD—in the case in this court, which was cited, the tenant in possession opposed both. In that in C. B. the tenant in possession had no sort of right.

HIS LORDSHIP proposed to have the fundamental principles considered; and old cases prior to the act of parliament looked into; and declared that he had it at heart, "To have the practice upon ejectments clearly settled, upon large and liberal grounds for advancement of the remedy."

The great ADVANTAGE of this fictitious mode is, that being under the * control of the court, it may be so modelled as to answer in the best manner every end of justice and convenience.

* Vide ante 663.

PUBLIC UTILITY has adopted it in lieu of almost all real actions: which were embarrassed and entangled with a thousand

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FAIRCLAIN
182. 183.

FOWLER & al.
v.
SPANTILL.

land niceties. But as there was good and bad in the method of real actions, the good ought to be grafted into ejectments; in such manner as to avoid the bad.

He added, it is worth considering, upon what principles landlords were admitted to be co-defendants, before the act of 11 G. 2. And desired that every body, that knew of any old cases prior to the act, would inform the court of them. He mentioned a loose note in 12 Mod. 211. and the case of *Goodright v. Hart* in 2 Sir J. S. 830.

Mr. Justice DENISON thought it had been considered in C. B.

§ 12.

Mr. Justice WILMOT thought the * first part of the act was not introductory of a new law; (for, before the act, a landlord might be made co-defendant:) but that the † second part of it was introductory of a new law.

† § 13.

He proposed to have the point settled, and for that purpose, to have the practice of the court of common pleas inquired into.

Lord MANSFIELD proposed to have it considered, whether there can be any reason for making a landlord co-defendant, which will not also hold for making a landlord defendant in the *stead* of the tenant; and also to have it considered upon the foot of convenience and expedience; and how it stood before the act of 11 G. 2. as well as to argue it upon the act; and also, what was the definition of a landlord, as it was understood when they were admitted as co-defendants before the act.

It was then ordered to stand for further argument on Wednesday, 3d February 1762.

Mr. Harvey then argued on behalf of the lord by escheat,

A copyholder could never maintain a real action.

But for *lessees*, there were, in the time of real actions being in use, two sorts of this kind of action; viz. by writ of *ejectione firma, vi et armis*; and by writ of *quare ejecit infra terminum*: in the former of which, there was antiently only a judgment for damages, the term not being recovered; in the latter, the judgment was for recovery of the term, as well as for damages.

But in 14 H. 7. in an *ejectione firma, vi et armis*, (the former of the said two sorts of action,) judgment was given in

in B. R. "To recover the *term*, as well as damages; and "it was affirmed upon error." And in another case in 17 H. 8. in C. B. the like was done there. *V. F. N. B. 490.* H. title *ejectione firma*.

1763.

FAIRBANKS
LANDLORD.
V. F. N. B. 490.

After which, it became the ordinary method of trying titles to land; and was adopted by *lessors* as well as *lessees*.

But, at first, the lease was really sealed upon the land (as a guard against maintenance;) and the action was brought against the *real* tenant in possession.

Afterwards, this mode of proceeding was abused; and casual ejectors were set up: by which method, the tenant in possession might be turned out, even without notice. *See 1 Keble 705.* It is said, "That *Keeling* conceived this way of "ejectment was a new device since the late troubles." But it was a much older practice.

After which inconvenience and others being discovered, NOTICE to the tenant in possession was required. *V. Rayn. 93.* *Keys v. Braydon*, (S. C. with 1 *Keble 705.*)

The modern rule was introduced in the time of Lord Chief Justice *ROLLE*.

But from the time of setting up casual ejectors, the admitting landlords to defend, TOGETHER WITH the tenant in possession has prevailed. In *Style 368. H. 1652*, it appears that both the courts of *king's bench* and *common pleas* would grant this to a person claiming title to the land. 1 *Siderf. 24.* 12 C. 2. shews that it was then usual. *Lilly's Abr. 497.* 23 C. 2. "One who hath title to the land in question may, "upon motion to the court, be made defendant with the "tenant in possession, that he may thereby defend his title." And this continued to be the method of practice.

The act of 11 G. 2. c. 19. was occasioned by the deficiency of justice, in this method; in two respects.

ONE of them was the under-tenant's not acquainting his landlord. And the loose note in 12 *Mod. 211.* (anonymus) is the only case where the doctrine is laid down, "That if notice in ejectment be given to the under-tenant, and he doth not acquaint his landlord therewith, but suffers judgment to go against him, the court (upon motion) will not suffer execution to be taken out, till the right be tried."

The

1762.

FAIRCLAIN
ex dimiss.

BOWLER & AL.

.SENTENCE.

v. 12.

t 13.

The other deficiency of justice was that mentioned in the case in 2 Sir J. S. 830. *Goodright v. Hart et ux* P. 2 G. 2. where the tenant would not defend.

The former of the two clauses of 11 G. 2.⁴ provides against tenants secreting ejectments from their landlords. The latter of the two clauses consists of two parts. The first part of it only gives power to do what had usually been done before, viz. Admitting the landlord to defend together with the tenant in possession. But the second part provides for admitting him to defend instead of the tenant, which had been, in some late cases, denied. See Cases of Practice in C. B. (by Mr. Cooke) 99. P. 7 G. 2. in a case of *Right v. Wrong*, it was refused: nor would the court oblige the tenant to defend, even upon indemnification. So also in 1 Barnes 114. Tr. 6, 7 G. 2. C. B. in the case of *Balderige v. Paterfon*—the Court denied to make the landlords defendants without the tenant in possession, who refused to appear: but they made the common rule, "To add them." 1 Barnes 120. H. 8 G. 2. C. B. in the case of *Goodright, ex dimiss. Duke of Montague v. Wrong*—the court refused to admit the landlord to defend alone, instead of the late tenant, who had quitted the possession.

These cases gave rise to the act of parliament of 11 G. 2. c. 19. § 13. part the second. They were all of them between the time of the case of *Goodright v. Hart* (in 2 Sir J. S. 830.) and the making of the said act of 11 G. 2. But since that act, it is clear, that at least all persons may defend WITHOUT the tenant in possession, who might, before it, have defended WITH him.

The 12th and 13th clauses of this act are not relative to one another. The 13th is an independent clause: (which point he argued at large.)

It was many years before this act, (even in 5 W. & M. Comberb. 209.) that a rule is laid down by Lord Chief Justice Holt, "That no man is to be admitted tenant or defendant in ejectment by the common rule, unless he hath been in possession or received rents; and not a mere stranger."

But the reason of that rule does not hold in the present case.

A lord by escheat's defending his title can never be considered as champerty: (which was one of the reasons.) However, this rule is inaccurately laid down in Comberb. 209.

The

The adding unnecessary defendants is now prevented by §, 9 W. 3. c. 11. (§ 11.) "But before that act, lessors made several defendants in ejectment, in order to take off their evidence: and they could then have no costs, if acquitted. And the rule was made against lessors of plaintiffs, as well as against defendants: and it means to exclude only mere strangers to the possession."

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ex admor
FOWLER & al.
v.
SHAWTILE.

*V. ante, 1284.

In *Comberb. 339. Tr. 7 W. 3.* in the case of *Jones*, lessee of *Prille v. Carwithen*;—Lord Bath, the reversioner, was admitted a co-defendant with the tenant.

In *Comberb. 332.*—A trustee may be admitted, if he desires it; though not without his consent. So, a mortgagee may be admitted.

The true rule of admitting as a co-defendant before the act, was "That a mere stranger shall not be admitted: a person NOT A MERE STRANGER has a right to be admitted." He had a right to this. 1 Salk. 257. Tr. 11 W. 3. B. R. in the case of *Underhill v. Durham*, "A landlord may be joined a defendant with the tenant in possession if he requests it; but the court can not compel him to it."

Now a LORD BY ESCHEAT is not a mere stranger; but has the immediate right and title, in case no heirship is made out: and therefore he is the most proper person to contest that point of heirship, by whomsoever claimed. And he may very well and reasonably be considered within the word "LANDLORD:" the tenant in possession is his tenant at will, if there be no heir.

A lord by escheat is a title favoured even in a freehold; as appears by lord Buckhurst's case, 1 Co. 2. b. 10 E. 4. 9. b. Much more shall it be favoured in a copyhold case, where the freehold is never out of the lord. The tenant in possession is only tenant at sufferance to the lord by escheat, after the death of the last admitted tenant has been presented. And his not having been in actual receipt of the rents, can be no solid objection.

There must be a trial of the title, before possession can be obtained. This is a fixed principle. In *Comberb. 13.* A motion was made for judgment in ejectment, upon a lease sealed on the land; and denied: for per cur.—"You must try it." 12 Mod. 211. Where the tenant suffers judgment

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ment without giving notice, &c, the court will not suffer execution to be taken out *till* the right be tried.

In the present case, a stranger may get the possession, unless the lord be admitted to defend his title. It is not worth the tenant's while, to defend it: for, his possession will be determined immediately, *which-ever* side prevails.

Suppose it had been a vacant estate; the lessor of the plaintiff must have sealed his lease upon the land, and set up a casual ejector. But by *Comberb. 13.* The court would not, in that case, have suffered execution to be taken out, *without a trial and making out* his title. And the court would have permitted the lord by escheat to have seen that the title was well made out. Consequently, the court would, in such case, have admitted the lord to defend; in order to oblige the plaintiff to go down to trial and make out his title.

And there is as much reason to do it, where the tenant *deserts* his claim.

Suppose two persons, one claiming as heir, the other as lord by escheat, both bring ejectments, and both recover judgment; how shall the sheriff know to *which* of them he is to deliver possession?

This method, of admitting a lord to defend, will prevent a circuity of litigation.

* 2 Barnes Appendix 28.
† Vide ante pag. 1291. in margin.

Then he answered their cases; viz. * *Roe v. Doe*, in Barnes; and † *Scarlsbrick's* case. We do not know the circumstances of the case of *Roe v. Doe*: but there had been a long possession on the other side. *Scarlsbrick's* case is within the rule.

We desire only an opportunity to TRY THE TITLE.

LORD MANSFIELD—We have thought very fully of this matter, since it came on last: and we are all of opinion that it must be tried between the two claimants, the heir and the lord. The occupier has no interest or concern in the question. He ought not to take a side, or prejudice either. He does *not* appear. The question should therefore be tried in a way to give *neither* any advantage from his possession. It may be done, in a *feigned issue*: or, an ejectment brought by the lord, with an *admission* of his title, will come to the same thing.

Where:

Whereupon, THE COURT recommended, and the counsel on both sides consented to a fair trial of the lord's title to claim by escheat: and the method was, at length, agreed upon; viz. That the lord (who could never come into possession *without* an ejectment to be brought by him) should immediately bring his ejectment against the present lessors of the plaintiff; and that the said lessors of the present plaintiff (who claimed as heirs of the deceased) should be admitted to defend, either alone or together with the tenant in possession; and such ejectment to be tried at the next assizes. And the counsel for the present plaintiffs were to admit "That all the lands lie in one and the same manor, and that such manor belongs to Earl Gower as lord of it."

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ex dimiss.
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SHAMTITA.

And THE COURT reserved the consideration of the present motion and of the rule now depending, till *after* such trial should be had: which they did, in order to retain the power over the matter, in case any thing should be attempted at the trial, contrary to the real present intention of having the question fairly tried; and also in order to give such future directions concerning the award of execution; as should then appear to be fit and proper.

Note—

Mr. Justice WILMOT observed that it was very remarkable, that two different acts of parliament had been made, at near 500 years distance, upon the very same subject, where there was no occasion for either; viz. the statute of *Westminster* 2. * (13 Ed. 1. A. 1285.) and this act of 11 G. 2. c. 19.

* *Westm. 2.*
c. 3.

The statute of *Westminster* 2. c. 3. He said, was not a new provision: for, *before* that statute, all those that stood behind the tenant in possession had always a right, at common law, to come in and be received, *pro interesse suo*, to defend the possession, which was very material to them, and by the change whereof they would have been greatly incommoded. And he said he was persuaded that the more this doctrine of *reccit* was looked into, the stronger this would appear. And therefore he wondered that there should have been any doubt, before the act of 11 G. 2. of admitting landlords to defend in the *stead* of the tenant in possession; especially, as they were suffered to make themselves co-defendants with the tenants. (He referred to Lord Coke and to *Bracton*, but did not specify the particular passages or pages.)

† V. 2 Inst.
344, 345, and
Bracton, lib. 5.
fo. 393. b.
No. 14.

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ex dimiss.
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SHAMTITLE.

So, before the act of 11 G. 2. c. 19. It was certainly the practice to admit the landlord and the tenant in possession co-defendants.

He took notice likewise, that notwithstanding all the pains that the legislature had taken to cut off dilatories, yet it was the courts of Westminster-Hall to whom the public were obliged, for finding out this easy and expeditious method of trying titles by EJECTMENTS.

* 2 Sir J. S.
330.

Lord MANSFIELD asked the counsel on both sides, "If they had found any case prior to that of *Goodright v. Hart et ux. P. 2 G. 2.* in *Sir J. S. where the Court had refused to let in persons who stood behind the tenant in possession, to defend *pro interesse suo*, in the stead of the tenant in possession."

Answer—None at all.

Lord MANSFIELD—Then there is no other but that which denies the authority of the case in 12 Mod. 211.

The precedents before are more liberal.

Style 368.

In 1652, it was said by the protonotary, "That the court would, upon terms, allow him who alledged title, to defend it."

Comberb. 339.

In the 7th of King William, Lord Bath claiming the reversion by deed, after the death of tenant for life who received the rent, was admitted a defendant, because it might shake his title.

12 Mod. 211.

In the 10th of King William, it is laid down as a certain rule, "If notice in ejectment be given to an under-tenant; and he doth not acquaint his landlord therewith, but suffers judgment to go against him; the Court, upon motion, will not suffer execution to be taken out, till the right be tried." Which is decisive, that the landlord should not be betrayed, but might defend alone.

In the first of Queen Anne, Holt says "It is due, of right, to the landlord, to be made defendant: for, otherwise, the tenant in possession might combine with the lessor of the plaintiff, and oust the landlord of his rent. And to deny the lady that right, would be upon the presumption of her marriage: which would be directly to determine the point
" in

"in question." The combination of the tenant in possession could not be prevented, *unless* the landlord might defend alone. And the rule is laid down in a case *like* the present, where the question turned upon "*who was landlord.*"

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FAIRCLAIM
ex dimiss.
FOWLER & al.

SHAMTITILE.
Strange 830.

Thus stood the *reasoning* and *practice*, when the motion was made in *Goodright v. Hart et ux.* in 2 G. 2. It seems to have been very little considered. The *only* reason given why the tenant might betray his landlord by refusing to appear, ("Because the landlord was made a defendant *und cum* the "the tenants in possession,") equally, at least, proved the *contrary*. It was a breach of the rule, in the tenant, to *pre-vent* his defending. No wonder Sir John Strange adds a "*Quare tamen* : for, this is giving tenants much too great "a power ; and makes them absolute masters of the estate, "and to choose their own landlords." The Court refusing to relieve the landlord, he practised with the tenants, to at-torn. Then the plaintiff in ejectment moved: but was de-nied relief. So the Court first suffered the plaintiff in ejectment, by corrupt practice with the tenants, to dispossess the landlord by a judgment, without any opportunity of trial; and then suffered the landlord, by corrupt practice with the tenants, to defeat the judgment and possession given in conse-quence thereof. This case certainly occasioned the clause in the act of parliament relative to this subject. As the parlia-ment has contradicted it, one may venture to say "It was "*hasty.*" Every reason of private justice and public con-venience, and every authority was the other way.

A RULE by consent having been ordered to be drawn up against to-day,

LORD MANSFIELD now declared, that he was clear that this method of "Putting the person claiming to be lord by "escheat to bring his ejectment;" was the *proper* way of try-ing the right upon the merits.

If there was really no heir, then the lord stood in the place of the deceased: but if there was any heir whosoever, the lord's claim was at an end.

The court would have obliged him to come into *some* method of trying the right, in a proper issue: and *this* method into which it is now put, (*viz.* his bringing an ejectment,) is the most *proper* issue for that purpose.

If the heir had refused, the Court would have admitted the lords to defend: which would have given them the benefit of

1762.

FAIRCLAIM
ex dimiss.
FOWLER & al.
v.
SHANTILLE.

possession. If the lords by escheat had refused to consent, we would have discharged the rule. For, certainly, where the sole question turns upon "Who ought to be landlord to the tenant in possession," he should stand *neuter*, and his possession avail NEITHER: the question ought to be tried *between* the CLAIMANTS. The plaintiff must consent: else, the other is admitted to defend; (as in the case of *Fenwick* and *Gravenor*.) The other must consent; because, to insist "That he is landlord," begs the question to be tried.

RULE by consent, as before, pa. 1301.

(1 Black. Rep.
336. S. C.)

Friday 5
Feb. 1762.

Costs for not going to trial, shall be paid to defendant; by course of the court, on informations for misdemeanors, where prosecutor does not countermand notice of trial in time.

Rex versus Heydon, Head, and Roper,

UPON informations for misdemeanors,

Mr. *Morton*, on behalf of the defendants, moved to discharge a rule for referring it to me "To tax costs to be paid to the defendants, for the prosecutor's not going on to trial." These were three informations for bribery at an election to parliament. And the same rule had been made in all the three causes.

He moved it, first, on a point of law; secondly, upon the merits.

First, There were *no costs* at all, he said, upon informations, before the statute of 4, 5 W. & M. c. 18. And by that act, the court have no authority to give costs against the prosecutor, till he shall have neglected to prosecute with effect for the space of a YEAR: the words of it are—"In case the prosecutor shall not within one whole year next after issue joined, procure the same to be tried." But this is within the year.

Secondly, The merits were, that the adverse party detained the books, which were the prosecutor's only evidence: which detention obliged the prosecutor to withdraw his record, and was the only reason of his not going on to trial.

Mr. *Stowe* and Mr. *Ashurst*, contra, for the defendants,

First, The act of 4, 5 W. & M. c. 18. § 3. means the final event of the cause; and relates only to the not proceeding at all in the cause for a whole year.

But

But by the *course of the court*, without any aid from this statute, a prosecutor shall pay costs for the *vexation of not going on to trial*, without countermanding his former notice of trial: and they mentioned a case of † *Rex v. Rossier et al.* where precedents of it upon informations were cited † *executors* shall pay costs for *not for going on to trial*.

Secondly, The defendant is not bound to *furnish* the prosecutor with evidence against himself. He should have come prepared; and ought not to have given notice of trial, till he was prepared.

The counsel for the plaintiff in reply—

Upon the gentlemen's *own* principle, the prosecutor ought not to pay costs in this case: for here was *no vexation*, or any thing like it; nor is there any reason why the court should punish the prosecutor in costs. He had reason to expect that the books would be produced at the trial: the defendants gave him hopes of producing them.

Lord MANSFIELD—First, by the constant *course of the court*, the defendant is intitled to costs, if the prosecutor gives notice of trial, and neither *goes to trial*, nor *countermands* it in time: and no instance can be produced, that I know of, to the contrary.

Secondly, Yet if the defendant *had drawn the prosecutor in*, "To give notice of trial," by giving him hopes of producing any books; *that* might be a reason for *not* giving the defendant any costs.

But no such thing appears in this case: there is no colour, upon the affidavit, to say it.

Therefore there is no reason to except this *out of the general rule*.

Mr. Justice DENISON—I am of the same opinion.

Mr. Justice WILMOT—And I.

(Mr. Justice FOSTER was absent.)

NOTHING taken by the motion.

F 4

Reavely

1762.

REX v. HEY-
DON, HEAD
and Another.

† In Trinity
Term 1761.

† There were
so: viz. *Rex*
v. Allen and
Hazard. M. 5
W. & M. (v.
Comberb. 225.)
and *Rex v. Earl.*
Tr. 4 G. 2.
(*v. Sira. 374.*)
See *Salk. 193.*
Rex v. Ed-
wards: and
1 Sira. 33.
Rex v. Popwill
et al.

1762.

Saturday, 6
Feb. 1762.New trial not
granted, as an
hard case.*Reavely versus Mainwaring Esq; Walker et al.*

THIS was an action of trespass *vi et armis*, for taking five boys, apprentices to the plaintiff, out of the hands of the plaintiff.

Lord MANSFIELD, who tried the cause, reported the evidence.

These were apprentices regularly bound to *Reavely*, for the sea serviet. The action was trespass *vi et armis*, for taking them.

It was proved, on the part of the plaintiff, that they were voluntarily indentured to him; and were by his direction delivered to one *Jones*, to be kept by him, to prevent their running away. Part of *Jones's* house was a prison; part, a public-house.

The justices, at their session of gaol-delivery, upon a complaint of "An intention to sell them in *Guinea*," discharged them.

Reavely ordered them to be put into the hands of *Jones*. *Walker* sent a note to *Jones*, to deliver them to the lieutenant of a tender of a man of war; who thereupon delivered them, and took a receipt for them.

This was the evidence for the plaintiff.

On the part of the defendants, it appeared that one *Lane* told *Walker*, of the boys complaints, and of the affecting scene that he had seen.

One of the boys also gave evidence of *Blackwood's* picking them up; and of their being deceived, and ill used at *Jones's* and their endeavours to escape. That *Walker* and *Pell* came to the prison; and the boys made their complaints to them. Upon which, they were sent for to the court-house: and they all made their complaints to the justices, of their being deceived, imprisoned, ill used, &c; and their apprehensions of being sold. The plaintiff, next morning sent coaches to carry them away. They resisted. *Walker* (who was lieutenant of a man of war) being present, asked them if they were willing to serve the king. They assented. He sent a press-gang. They went with their own consent. They begged of the justices to be set at liberty. They were brought into court before the justices as prisoners.

But

But no commitment being produced, the justices discharged all and each of them, by writing against their names—“Discharged.” Walker bid Jones to keep them that night. But there was no order to deliver them to Walker: they were only discharged from being kept as prisoners. Whereupon Walker asked if they were willing to serve the king: to which they assented. And Walker gave Jones a guinea to take care of them that night.

At the trial, all the defendants were found “Not guilty”; as well the justices as the lieutenant.

Mr. Yates now shewed cause against a new trial, which had been prayed by the plaintiff.

He insisted, that as the boys were in the hands of Jones, who, he said, was agent to the plaintiff, and delivered them to the lieutenant who commanded the press-gang, upon a note from Walker, and took a receipt for them from him; here was no force: therefore trespass *vi et armis* will not lie. It ought to have been an action upon the case, or an action upon the statute of laborers: for which, he cited *Bro. Abr. Title Laborer*, 21, 28, as in point, 6 Mod. 182. *Queen v. Daniel*, (the second resolution) is in point also, “that a common action of trespass will not lie, for enticing an apprentice or servant from his master, if there be no force.”

And here Jones’s delivery was the delivery of the plaintiff: he was the owner’s agent.

Mr. Solicitor General and Mr. Morton, on behalf of the plaintiff, did not dispute the law, but the fact.

The justices discharged the boys: they were put into the hands of Jones, by the justices. Walker ordered them out of Jones’s hands into the hands of the lieutenant who headed the press-gang.

Here was no seduction or enticement; but a forcible taking away a man’s apprentices by a press-gang, and carrying them on board a man of war, in which, Walker was concerned, as having actually sent the press-gang to fetch them. And in trespass, all are principals.

Lord MANSFIELD—It was objected, at the trial, that Walker could not be liable to an action of trespass *vi et armis*: for that Jones delivered them up voluntarily to the lieutenant.

But

1762.

FRANKLY V.
MASHMANN
and Another.

But I thought then, and now think that he *was* liable to this action; because he sent a *force*, a press-gang to take them.

As to the justices,—There was no colour to maintain the action against them.

A special jury of gentlemen found all the defendants *not* guilty.

I think they *ought* to have found *Walker* guilty, upon the evidence that was laid before them. Yet it would have been very hard, if *Walker* had suffered for his behaviour upon this occasion; because he seems to have acted with good intentions.

Therefore I think there ought *not* to be a new trial.

RULE to shew cause "Why there should not be a new trial"—DISCHARGED.

Rex versus Clarke, et al.

Prosecutor can-
not prosecute in
forma pauperis,
without special
cause.

*V. Rex v. John
Spooner, 28th
November 1776.
B. R. (which
was an *informa-
tion*.)

MR. NASH moved to make a rule absolute, (on a proper affidavit of service,) for admitting a PROSECUTOR of an *"indictment to PROSECUTE in forma pauperis."*

But the COURT (on being apprized that it was on behalf of a *prosecutor*,) denied to make the rule absolute; as it was founded only on the common petition and affidavit usually produced by DEFENDANTS in order to their obtaining such a rule: for, they held that PROSECUTORS ought not to be admitted to *prosecute in forma pauperis*, unless some special ground was laid for the motion.

And Mr. Justice WILMOT observed, that in *civil* cases, plaintiffs were not admitted to *SUE in forma pauperis*, unless counsel certified "That there was some foundation for their *"suing."*

Rex versus Inhabitants of Minchin-Hampton,

Friday, 12 Feb.
1762.

If betch be tim-
ber by the cus-
tom of the coun-
try, it is not lia-
ble to the poor's
rate.

SAMUEL SHEPPARD, Esq; having appealed to the quarter-sessions of the county of Gloucester, from a rate (confirmed by two justices of the peace) which charged him for

for some woodlands which he owned and occupied; the sessions, upon such his appeal, discharged *that part* of the rate, and amended it with respect to the charge upon Mr. Sheppard; holding him *not* to be rateable for them, upon his particular case: which they stated to be as follows, *viz.*

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REV.
M^r MINCHIN
HAMPTON in
habitants.

That the said Samuel Sheppard is owner and occupier of two hundred and fifty acres and upwards of woodland in Minchin Hampton. The wood growing thereon consists chiefly of BEECH, and some oak and ash. There is no coppice wood. The under wood is left to grow as standards. Great quantities of such beech wood have yearly been cut and sold by the said Samuel Sheppard; (and in the two last years, forty or fifty cord each year,) for FIRE-WOOD; of the value of from twenty-three shillings to twenty-six *per cord*: all which said wood so cut for *cord-wood* is of thirty years growth, or upwards; and some, of sixty or eighty years; and, generally, from *ten to twenty inches square*. That many of the largest beech-trees cut in such wood, are sold as *cord-wood* and *faggots for fire-wood*; and that the other of such trees cut therein, are sold for making *gun-stocks, saddle-trees, and card-boards*: and SOME PART for *building*. That pigs were let run in those woods, for the eating of the masts: for which the proprietor had a pecuniary profit, when so done. That twenty pounds worth of such wood is sold for *fire-wood*, to twenty shillings worth sold for *any other purpose*. And in the last year, there was made a clear fall of three or four acres. The sessions are of opinion "That such woods are NOT rateable to the "poor's rate, by law."

On the last day of Michaelmas term 1760, Mr. Price, on behalf of the parish, moved to quash this order of sessions; urging that Mr. Sheppard ought to be rated for these under-woods, as SALEABLE under-woods, within the express words of 43 Eliz. c. 2. though some part of the produce of this two hundred and fifty acres of wood had been used for building; for, it is stated, that twenty pounds worth was sold, for twenty shillings worth used in building. And he had a

RULE to shew cause,

On Saturday, 7th Feb. 1761, instead of shewing cause, why this order of sessions should not be quashed;

Mr. Norton (now Sir Fletcher Norton,) who was for discharging the rate, insisted that beech was esteemed TIMBER in that country; and that it ought to have been, and was intended

1762.

EX. 7.
MINCHIN
HAMPTON IN-
habitants.

intended to have been so stated: and that therefore the case was imperfectly stated, and ought to be sent down again to be re-stated.

Which was denied by Mr. Gould, who was counsel on the other side.

After much litigation,

THE COURT directed that it should be sent down to be re-stated; and that Mr. Norton's client should pay the costs hitherto incurred.

On Monday 23 November 1761, M. 2 G. 3. the re-stated order being sent up, a rule was made (as before) to shew cause why it should not be quashed.

The words of the *new* state are as follow,—"We are of opinion, that the same wood, BEING *timber-trees* as afore-said, are not rateable to the poor's rate by law."

On the last day of that term, Mr. Serjeant Nares, (who was for quashing the order) offered to try, in a feigned issue, "Whether *beech*-wood is *TIMBER*, by the particular custom of that country."

LORD MANSFIELD—*Beech* is certainly *not* timber by the general law of the land: yet it *may* be timber by the particular custom of the place; I do not mean, of the county, but of that particular part of the country where the trees grow.

Therefore let it go back to the sessions, to be positively stated, "Whether *beech* is or is not timber, *there*." For they have not yet stated positively, whether it is or is not so.

Hilary term 1762. 2 G. 3.

The order being returned up again, is as follows, viz.

Upon the re-hearing of the appeal of *Samuel Sheppard*, of *Minchin Hampton* in this county, esq; in pursuance of and in obedience to another rule of his majesty's court of king's bench made in *Michaelmas* term last, against part of the rate or assessment made for the relief of the poor of the said parish of *Minchin Hampton*, that is to say, touching the sum of money charged upon him the said *Samuel Sheppard* in respect to and for certain woods of the said *Samuel Sheppard* in the said parish of *Minchin Hampton* in his own possession; this

this court, having fully re-heard as well the said *Samuel Sheppard* as the churchwardens and overseers of the poor of the said parish of *Minchin Hampton*, touching the said appeal and premises, do find, adjudge and finally determine, that the said *Samuel Sheppard* is charged for his said wood there, *being* **TIMBER trees**, when in fact he ought not to have been charged for the same, and is thereby aggrieved: it is therefore ordered by this court, that the said rate or assessment (now brought again into court) be forthwith *amended* in court, in respect to him the said *Samuel Sheppard*, as to the *item* therein where he is charged for the said woods; and that the said *item* or charge in respect thereof be entirely *struck out* of the said rate or assessment; and that he the said *Samuel Sheppard* be and is hereby absolutely *acquitted*, *exempted* and *totally discharged of and from all payments* charged or rated in the said rate or assessment *upon his said woods* as aforesaid: the case appearing to be, that the said *Samuel Sheppard* is now owner and occupier of two hundred and fifty acres and upwards of *wood lands* in the said parish of *Minchin Hampton*; that the wood growing thereon consists chiefly of *beech*, and some oak and ash trees; that there is *no coppice wood*; that the *under-wood* is *left to grow as standards*; that BY THE CUSTOM OF THE COUNTRY where the aforesaid beech, oak and ash trees grow, (being the trees in question on this appeal,) **BEECH IS TIMBER**; that great quantities of such beech-wood have yearly been cut and sold by the said *Samuel Sheppard*, (and in the two last years, forty or fifty loads each year,) for fire-wood, of the value of from twenty-three shillings to twenty-six shillings *per cord*; all which said wood so cut for cord-wood, is of thirty years growth or upward, and some of sixty or eighty years, and generally from ten to twenty inches square; and that many of the largest beech trees cut in such wood are *sold as cord-wood*, and the *faggots for fire-wood*; and that the other of such trees cut therein are *sold for making gun-stocks, saddle-trees*, and *card-boards*, and *used as timber*, for the several purposes of building, but not so frequently as elm or oak; that *pigs* were let run in those woods, for the eating of the masts; for which, the proprietor had a pecuniary profit, when so done; and that twenty *pounds* worth of such wood is sold for *fire-wood*, to twenty *shillings* worth sold for any *other* purpose; and last year, there was made a clear fall of three or four acres. And THEREFORE, we are of opinion, "That BY THE CUSTOM of the country, where "the trees and woods in question as aforesaid grow, **BEECH "IS TIMBER**, and therefore *not rateable* to the poor's rate "by law."

On Saturday, 6th February 1762, Mr. Serjeant Nares moved to quash this order: for that although the sessions have

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Ex v.
MINCHIN
HAMPTON &c.
habitants.

1762

REX V.
MINCHIN.
HAMPTON IN-
HABITANTS.

have now indeed returned it as their opinion, "That beech is timber in that country, by the custom of the country;" yet they have drawn their conclusion from *wrong premisses*, which they state particularly, and conclude that THEREFORE they are of that opinion. So that the court will judge for themselves, whether the sessions have determined right, or not.

A RULE was thereupon made to shew cause why the said new order should not be quashed:

The said new order being now read,—

Lord MANSFIELD said, that though the justices at sessions state a great many things that are immaterial, yet they expressly state "That beech is timber by the custom of that country." It is *not* the use it is put to, that makes it either timber or not timber: its being or not being timber depends upon the *custom of the country*. And if it be timber by the custom of the country, it must be *presumed* (and it may be true in fact) "That it was timber *before the time of queen Elizabeth*."

The ORDER of SESSIONS must be AFFIRMED.

The End of Hilary Term 1762. 1 G. 3.

Easter

Easter Term,

2 Geo. 3. B. R. 1762.

Rex versus Smollet;

Rex versus Hamilton,

MR. Solicitor General moved, on *Thursday* last; in behalf of Mr. BARLOW, clerk in court for Admiral Knowles the prosecutor in these causes; to whom the executrix of his late attorney Mr. Chapone (lately deceased) had delivered a bill, which included Mr. Barlow's bill in these causes, which bill of Mr. Barlow's had already been taxed, as well as Mr. Chapone's own bill: that Mr. Knowles might be at liberty to pay to Mr. Barlow his bill as clerk in court; and that on payment of the remainder of Mr. Chapone's bill to the executrix of Chapone, she should deliver up to him all his papers and writings remaining in her hands,

And he cited a case in *Hilary* term 1739, 13 G. 2. B. R. where the like rule had been made, for the payment to Mr. Henry Walrond, by Sir John Rusbout and Mr. Rudge, of Mr. Walrond's bill, after the death of Mr. Ingram, attorney for Sir John Rusbout and Mr. Rudge, in the *Evesham* causes: which bill of Mr. Walrond's as clerk in court in a cause between the King and Biddle, was included in Mr. Ingram's bill delivered to them,

Lord MANSFIELD said, it was so plain, and so obviously just and reasonable, that it did not want any precedent to support it. Accordingly, a rule was made to shew cause;

And, it was now MADE ABSOLUTE,

(1 Black Rep. 269. S. C. but not S. P.)

Monday 19 May 1762.

Clerk in court's bill included in attorney's, and taxed together with it, ordered after attorney's death, to be paid by client to clerk in court, and remainder to the attorney's executrix.

V. 2 J. S. 1126

Maxwell

1762.

Maxwell *versus* Mayor.(1 Black. Rep.
271. S. C. 364.)

Scots manufactures may be vended in England, by wholesale, without a licence, from the hawkers' office.

THIS was an action of trespass for taking the plaintiff's goods: to which, "Not guilty" was pleaded. On the trial at *nisi prius*, a case was reserved for the opinion of the court.

The case stated was this—

That the plaintiff was a *native of Scotland*. That he was a *hawker and pedlar*, carrying linen goods of the *manufacture of SCOTLAND*, from town to town in *ENGLAND*; and exposing them to sale, in a room in each town, by *WHOLESALE only*. And that he traded in *St. Sampson's parish in York*, without any *LICENCE*.

That upon an information duly made against him for this, before the defendant, who was a justice of peace for the city of *York*, the plaintiff was required by the defendant, the justice of peace, to *produce a LICENCE* for so doing: but he insisted, that it was not *necessary* for him to have a licence; as he was a *native of Scotland*, a *wholesale dealer* in linen of the *manufacture of SCOTLAND*, and sold by *WHOLESALE only*.

That the defendant thereupon convicted him in the penalty of twelve pounds; which penalty he refused to pay. That the defendant, the justice of peace, therefore issued his warrant to distrain, &c: which was executed, &c. And for this, the present action was brought.

The question was, "Whether the plaintiff (who was a *native of Scotland*) being a *WHOLESALE dealer* in linens of the *manufacture of SCOTLAND*, was obliged to take out a *LICENCE*, to qualify him to trade thus, by *wholesale*, in *ENGLAND*."

It was first argued on *Tuesday 25th of November 1760*, by *Mr. Clayton*, for the plaintiff, and *Mr. Yates* for the defendant; and again, on *Friday 6th of February 1761*, by *Mr. Aston* for the plaintiff, and *Mr. Norton* for the defendant.

For the plaintiff, it was insisted, that the *UNION* took away all distinction between the two kingdoms, and between the natives of one or the other; and that the *manufactures of SCOTLAND* are, since the union, the manufactures of "THIS kingdom," within the meaning of 9, 10 *W. 3. c. 27. § 1*,

2, 3, taken together with the following sections, 4, 6, 14, 18, and 25; (upon which act of 9, 10 W. 3. this conviction was founded.)

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Maitland v. Martin.

And all claims arising under subsequent statutes are good and valid for the future, under precedent statutes; though they did not even exist, when the former statutes were made. In *Plowden*, 120, and 127, a. b. *Sir Richard Bulkley v. Rice Thomas*, upon the stat. of 27 H. 8. c. 26. (uniting England and Wales,) upon the third exception; *Brooke, Saunders* and *Browne* were of opinion for the plaintiff. *Staundforde, Pysfne Justyce* held indeed for the defendant: but the three others held, "That the subsequent statute communicated the remedy given by the preceding one."

By 5 Co. 49. b. *Vaughan's case*, second resolution, "All the statutes of England extend to Wales; because Wales is made parcel of England."

And so also the legislature declared, in 20 G. 2. c. 42. § 3.

THE COUNSEL for the defendant argued, that the present question depends singly upon the acts of parliament made relating to *hawkers and pedlars*; and that where several laws are made relative to the same thing, all of them must be taken together, or as one law.

The act of union did not mean or intend to meddle at all with the *hawkers acts*. And the Scots have never born any part of the burthen imposed by the acts relating to hawkers and pedlars: therefore they are not intitled to the benefit of them.

The act of 5 Ann. parliament 2. Sess. 2. c. 19. § 1. continues the hawkers act for 96 years, without saying a word about *Great Britain*: and this act was made immediately after the union.

The 6 Ann. c. 5. § 4. continues these duties, within the whole kingdom of *Great Britain*, for one year after the expiration of the 96 years. So that this question can not properly arise, till after the year 1806.

The exemptions of 3 Ann. and of 9 W. 3. must be taken to be equally extensive: for, the provisions are the same in both.

This law never attaches upon the manufactures of Scotland. The hawkers act does not extend to them: therefore it can not exempt them. Nor ought it to extend to them, when

1762. the burthen does not. And it a great ADVANTAGE to Scotland, that neither the burthen nor the exemption do, for 96 years, extend to them.

MATWELL V.
MAYES.

And for this reason, the arguments from *Plowden* are out of the case: neither do the arguments from *5 Co. Vaughan's* case apply to the present case.

An exemption presupposes a lien. But here is no lien: therefore there can be no exemption.

And they alledged, that their construction of these acts of parliament were confirmed by usage.

THE COUNSEL for the plaintiff replied, that every man who sells these manufactures in *England*, is liable to the burthen: it is the selling in *England*, that renders them liable to the burthen, and within the exemption, therefore the burthen and the exemption are co-extensive. This is no particular or local regulation of trade: it is a benefit of trade, in general.

The *Scotch* do bear the burthen imposed by the hawkers and pedlars acts, equally within the *English*: and they are equally obliged to take out a licence, if they sell manufactures not exempted out of those acts.

THE COURT thought it proper that the following facts should be ascertained, before they gave their opinion; viz.
 "Whether since the union, persons coming from *Scotland*,
 "and bringing linen or woollen goods into *England*, and selling them by *wholesale*, do or do not usually take out licences: or whether there have been any, and what convictions of such persons who have sold *Scotch* linen thus by "*wholesale*."

After having taken time to inquire into these facts, and to consider it—

LORD MANSFIELD now delivered the resolution of the court.

He said they had had certificates from the commissioners, and answers to them; and replies, and rejoinders and surrejoinders without end: but, upon the whole, they (the court) were clear that there was no pretence for supporting such an USAGE as had been pretended on the side of the defendant.

The

The USAGE then being out of the case, the single question is, "Whether the linen manufacture of Scotland is or is not the linen manufacture of THIS KINGDOM, within the act of 9, 10 W. 3. c. 27. and the act of union."

1762.

MAXWELL V. MAYER.

And we are of opinion, "That the linen manufacture of Scotland is the linen manufacture of this kingdom, within those acts."

The argument "That the Scots are not intitled to the benefit, because they have never born any part of the burthen," does not conclude to the point; because they will bear their part of the burthen, from the time when the legislature have thought proper that it should commence upon them.

Therefore let the *posse* be delivered to the PLAINTIFF.

Rex *versus* Inhabitants of St. Devereux.

(1 Black. Rep. 367. S. C.)

This case is already published, in my quarto edition of SETTLEMENT CASES, No. 162. page 509.

Thursday 13 May 1762.

Rex *versus* Williams.

Rex *versus* Davis,

Saturday 15 May, 1762.

AN information was granted by the Court against the defendants, as justices of the peace for the burrough of Penryn; for refusing to grant licences to those publicans who voted against their recommendation of candidates for members of parliament for that burrough. It appeared that they had acted very grossly in this matter; having previously threatened to ruin these people, by not granting them licences, in case they should vote against those candidates whose interest these justices themselves espoused; and afterwards actually refusing them licences, upon this account only. And Lord MANSFIELD declared, that the Court granted this information against the justices, NOT for the mere refusing to grant the licences, (which they had a discretion to grant or refuse, as they should see to be right and proper; but for the corrupt motive of

Information granted against justices of peace, for acting corruptly and oppressively.

1762.

REX V.
WILLIAMS and
DAVIS.

such refusal; for their *oppressive* and *unjust* refusing to grant them, BECAUSE *the persons applying for them would not give their votes for members of parliament as the justices would have had them.*

*Rex versus Baylis et al.' Justices of the Peace
for the City of Gloucester.*

Friday, 21 May
1762.

Justices of peace
not appearing to
have acted cor-
ruptly.
Information re-
fused.

THE same PRINCIPLE was laid down in this case, as in the last mentioned case; though the present rule "For shewing cause why there should not be an information" was discharged, upon the *merits*; the justices *not* appearing to the court to have acted from the corrupt motive which the prosecutor of the rule had charged upon them.

V. *ante*, S. P. Pasch. 1758, 32 G. 2. pa. 556; 561. *Rex v. Young and Pitts, Esqs. and pa. 653. Rex v. Athay, Mich. 1758, 32 G. 2.*

The End of *Easter Term* 1762. 2 G. 3.

Trinity

Trinity Term,

2 Geo. 3. B. R. 1762.

Colebroke *versus* Dobbs.

Wednesday, 25
June 1762.

THE plaintiff having obtained judgment against the defendant, in an action of debt for an amercement in the court-leet of the manor of *Stepney*, the counsel for the defendant moved in arrest of judgment; and the case remained long depending: the first motion was made by Mr. *Altham*, on *Wednesday* 26th *January* 1757; the judgment of this court was pronounced upon *Friday* 26th *January* 1759; and the *exchequer* chamber affirmed it, in this *Easter* term, 1762. It was debated on *Friday*, 10th *February* 1758, by Mr. *Altham*, supported by Sir *Richard Lloyd*, on the part of the defendant; and Mr. *Lawson*, supported by Mr. *Norton*, on the part of the plaintiff; and the Court took time to look into the record.

Counsel not being prepared, no cause for court's not proceeding.

The court of *king's bench* in *Easter* term 1758, directed the case to be set down in the paper, as a *concilium*, for argument in the next following term, and to be then spoken to by one counsel on each side. It was afterwards set down accordingly, in the paper; and stood for argument upon *Friday*, 26th *January*, 1759: but the defendant's counsel said he was not prepared; having received his brief but the preceding evening.

THE COURT told him, that was his client's own fault; the defendant ought to have been ready. And they ordered the *POSTEA* to be delivered to the PLAINTIFF.

Note—The only reason of mentioning this case at all, is to prevent it's being hereafter cited as an AUTHORITY; upon a mistaken apprehension of it's having been determined in a solemn manner after argument and deliberation upon the weight of the objections.

1762.

(1 Black. Rep.
368. S. C.)
Saturday, 19
June 1762.

Quarter sessions
has jurisdiction
over conspiracies.

Rex *versus* Rispal.

THIS was an indictment found at the *Westminster* sessions of the peace, against the defendant and two others, for a conspiracy: but the *certiorari* was brought by *Rispal* only.

The indictment set forth, that *Antoine Rispal*, *Henry Bolney*, and *John Delaporte*, wickedly and maliciously devising and intending unjustly to vex and aggrieve one *John Chilton*, and to deprive him of his good name fame credit and reputation, on &c, at &c, wickedly and unlawfully did among themselves CONSPIRE, combine, confederate and agree, falsely and without any reasonable or probable cause, to charge and accuse the said *John Chilton*, "That he the said *John Chilton* had then lately before taken out of a bag, a quantity of human hair, which bag was contained in a bale, which consisted of five bags of hair, of the goods and chattels of the said *Antoine Rispal*."

That the said *Henry Bolney* afterwards, to wit, on &c, at &c, in pursuance of and according to the said conspiracy, combination, confederacy and agreement between him and the said *Antoine Rispal* and *John Delaporte* so as aforesaid before had, did say to the said *John Chilton* "That he the said *John Chilton* was a man of credit; and that he the said *John Chilton* had better make it up, than have his credit blasted."

That the said *Antoine Rispal*, in pursuance of and according to the said conspiracy, combination, confederacy and agreement between him and the said *Henry Bolney*, and *John Delaporte* so as aforesaid before had, afterwards to wit, &c, at &c, unlawfully and wickedly did exact, receive and had of and from the said *John Chilton* the sum of thirty pounds of lawful money of Great Britain, of the monies of the said *John Chilton*, and also a certain promissory note in writing bearing date the said 28th day of February in the year of our Lord 1758, signed under the hand of the said *John Chilton*, for the payment of the sum of thirty-three pounds to one *Thomas Higginson* or order, six weeks after date, and which said note was indorsed by the said *Thomas Higginson* to the said *Antoine Rispal*; for and as a composition for the pretended offence above specified, and to desist from all prosecution against the said *John Chilton* for the same; which said sum of thirty-three pounds hath been since paid by the said *John Chilton*, in discharge of the said note: whereas, in truth and in fact the said *John Chilton* never was guilty of the said offence so falsely charged on him as aforesaid, or of any such like offence. To the great damage, impoverishment, and disgrace of the said *John*

John Chilton; to the evil example of all others in the like case offending; against the peace of our said late lord the king, his crown and dignity; and against the peace of our present lord king *George* the third, his crown and dignity.

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RISPAL.

The defendants *Bolney* and *Delaporte* pleaded "Not guilty;" and the indictment was tried, as against them, at the *Westminster* sessions. *Bolney* was acquitted: *Delaporte* was found guilty.

The defendant *Rispal* did not then come in: but he afterwards came in, and pleaded "Not guilty;" and was tried and found guilty. Whereupon he brought a *certiorari* to remove it into this court.

On *Tuesday*, 26th of *January* last, Mr. *Lucas*, on behalf of the defendant, moved in arrest of judgment,

First objection—An indictment for such a conspiracy as this is, does not lie before the general sessions of the PEACE.

Second objection—The fact which the defendant conspired to charge the prosecutor with, is no offence. It is only an indictment for "wickedly and unlawfully conspiring &c, falsely to accuse "*John Chilton* of TAKING HAIR OUT OF A "BAG:" (without alledging it to be an unlawful or felonious taking;) whereas the offence whereof the party was accused, ought to be particularly charged: no implication will make it good.

A RULE was then made to shew cause why the judgment should not be arrested,

Afterwards on *Thursday*, 29th of *April* following, Mr. *Lucas* enforced his objections in arrest of judgment; And Mr. Solicitor General for the prosecutor, shewed cause against arresting the judgment: and it was then adjourned.

On *Wednesday*, 12th of *May*, it was argued by Mr. *Baynham* for the king, and Mr. *Morton* and Mr. *Siowe* for the defendant.

THE COURT were of opinion, that the justices of peace had jurisdiction in the present case; a conspiracy being a trespass, and tending to a breach of the peace: and they held, that the indictment was well laid; and that the gist of the offence is the unlawful conspiring to injure the man by this false charge. They all therefore concurred in opinion, That the rule ought to be discharged.

RULE DISCHARGED.

Hart,

1762.

(1 Black. Rep.
372. S. C.)Tuesday 22
June 1762.Defendant on a
qui tam action
cannot be dis-
charged on fur-
rendering his ef-
fects under the
lords' act.*Hart, qui tam &c, versus Hawkins.*

ON shewing cause against a rule which was drawn up generally, "To shew cause why the defendant should not be discharged out of custody of the marshal, *as to the execution with which he stands charged in THIS SUIT*;" but which only meant to bring in question, "Whether he could be discharged *as to the informer's moiety*;" (for it was not pretended even by the defendant's own counsel, "That he would be discharged as to the *crown's moiety*;"—)

THE COURT resolved, clearly and unanimously, "That defendants in QUI TAM actions are not at all included in the 13th clause of the act of 32 G. 2. c. 28. (*pa. 434.*)" for discharge of debtors in execution for sums not exceeding one hundred pounds, upon exhibiting their petition and assigning over all their estate and effects for the benefit of such of their creditors as shall have charged them in "execution:" and accordingly, they

DISCHARGED THE RULE.

Mr. Solicitor General was for the plaintiff: Mr. Baynham for the defendant.

Rex versus Sir Thomas Harrison, Chamberlain of London.(1 Black Rep.
372 S. C.)Wednesday 23
June, 1762.By law that a
butcher in Lon-
don shall be free
of the butchers'
company, good.

(In the Crown Paper.)

A Mandamus having issued, directed to Sir Thomas Harrison, knight, chamberlain of the city of London, to admit William Cope into the freedom of the said city; having served an apprenticeship to John Cope a freeman of the company of cloth-workers, and having afterwards duly admitted himself into the freedom of the said company of cloth-workers—

THE RETURN sets forth, that the city of London is an ancient city &c, and a body corporate, &c; and that there are several guilds, companies, &c; which guilds, companies, &c, have used and ought to have the overseeing, correction and government of the several persons, using and exercising the several arts, trades, misteries and manual occupations belonging to such several societies, guilds, fraternities, fellowships and companies, in the use and exercise of such arts, trades, misteries

ries and manual occupations within the said city and the liberties thereof; and that the said several societies, guilds, fraternities, fellowships and companies of the said city, and the men of the same, for all the time aforesaid have used and ought and yet use and ought to be *under the order, government and regulation* of the mayor and aldermen of the said city for the time being, with the commonalty of the said city in common council assembled.

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HARRISON,

The return further certifies a *custom*, "That every person, at the time of his or her admission into the said city, be *free of* SOME one of the aforesaid societies, guilds, fraternities, fellowships or companies of the said city; and be admitted into the freedom of the same city, as a freeman or freewoman of or in such society, guild, fraternity, fellowship or company."

Then it certifies another custom, "That no person not being free of the city may sell by retail, or keep any shop for retail sale, or use any occupation for hire, gain or sale, within the said city or it's liberties;" and that there is another custom within the said city, "That if any customs, obtained prevailing and used in the said city, be or have been *difficult, or defective in any part; or if any things newly arising in the same city, where a remedy is not or hath not been already ordained*, should want or have wanted amendment; the mayor and aldermen of the said city for the time being, with the assent of the commonalty of the said city in common council assembled, may apply and ordain, and have been used and accustomed to apply and ordain, and of right ought to *apply and ordain*, as often as to them shall or hath seemed meet, AN APT AND PROPORTIONABLE REMEDY in that behalf, for the *common benefit* of the citizens of the said city, and of other persons resorting thither; so as such ordinances be *agreeable to good faith and reason, not prejudicial to the king* and his progenitors, or to the *people*, and in *no wise contrary to the laws and statutes of this kingdom*." Which said customs, together with all the other customs of the said city, were ratified and confirmed to the then mayor and commonalty of the said city and their successors, by the authority of the parliament of the Lord Richard formerly king of England &c, the second after the conquest, holden at Westminster, in the seventh year of his reign.

The return further certifies, that there hath been for all the time aforesaid and still is, within the same city, a certain *ancient society or company* of persons using and exercising the art, trade and mystery of, BUTCHERS, within the said city and the liberties

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HARRISON,

liberties thereof; which said ancient society or company, on the 20th day of *June* in the twenty-seventh year of the reign of the late Lord *George* the second, king of *Great Britain, &c.*, and long before, was and still is a *body corporate*, by the name of the master, wardens and commonalty of the art or mystery of butchers of the city of *London*; and that the said company or society is and for all the time aforesaid hath been *one of the aforesaid companies or societies.*

The return then sets forth a BY-LAW, made at a common council of the said city holden according to the custom &c, on the 20th of *June* 1727; namely—that it was, by the authority of the same common council, in and by an act of the said common council, intituled “An act for regulating the company of BUTCHERS of the city of *London*,” enacted, ordained and established in manner and form as follows, *to wit*, “WHEREAS the master, wardens and commonalty of the art or mystery of butchers of the city of *London* are and have been an ancient fellowship and long since incorporated, and have obtained several royal grants for confirmation of their privileges; and *whereas* many persons who exercise the trade of a butcher within the city of *London*, have obtained their freedoms of OTHER companies, by redemption and otherwise; by reason whereof, the said company of BUTCHERS is MUCH DIMINISHED and MAY FALL in decay; for remedy WHEREOF, be it enacted, ordained and established, by the right honourable the lord mayor, aldermen and commons of the city of *London* in this present common council assembled, and by the authority of the same, that from and after the 29th day of *September* next, every person not being already free of this city, occupying, using or exercising, or who shall occupy, use or exercise the art, trade or mystery of a BUTCHER within the city of *London* or liberties thereof, shall take upon himself the freedom and be made a freeman of the said COMPANY of BUTCHERS; and that no person or persons now using or exercising, or who shall hereafter use, occupy or exercise the said art, trade or mystery of a BUTCHER within the said city or liberties thereof, shall from and after the said 29th day of *September* be admitted by the chamberlain of this city for the time being, into the FREEDOM or liberties of THIS CITY, OF or IN any OTHER company than the said company of BUTCHERS; any law, usage or custom of this city to the contrary notwithstanding: provided always, that all and every person and persons not being already free of this city, and who now are or hereafter shall be intituled to the freedom of any other company within this city by patrimony or service, and ought (in pursuance of this act) to be made

“ free

“ free of the said company of butchers, SHALL BE ADMITTED
 “ into the freedom of the said company of BUTCHERS, upon
 “ payment of *such and the like fine and fees (and no more)* as
 “ are usually paid and payable upon admission of the child or
 “ apprentice of a freeman of the same company.”

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The return then sets forth, that the said *William Cope* was educated as an apprentice in the art, trade or mystery of a BUTCHER; and at the time of the presentment of the said *William Cope* to the chamberlain to be admitted into the freedom of the same CITY (as in the writ is mentioned,) *did use, occupy and exercise and still doth use, occupy and exercise the art, trade or mystery of a BUTCHER, within the said city and the liberties thereof*; and that the said *William Cope*, at the time of such presentment as aforesaid, *was not, nor yet is a freeman of the said company of BUTCHERS.*

And for these causes, the chamberlain returns that he had refused to admit him into the freedom of the said CITY; nor can he admit him into it.

Mr. Yates, for the prosecutor of the writ, argued that this *by-law* is totally VOID.

He premised, that *Wannel's* case, which he supposed would be relied upon by his opponent, and which is reported in 1 Sir F. S. 675, and in 8 Mod. 267, is, *distinguishable* from this case.

Then he proceeded to object to the present *by-law*.

First objection—This *by-law* is *beyond their JURISDICTION.*

Secondly, The cause of making it is *insufficient.*

First—It *exceeds the jurisdiction* of the makers of it. For first, it *varies the constitution of the city essentially*; secondly, it *injures all the other companies of the city*; and thirdly, it *restrains trade.*

First, It essentially varies the constitution of the city. *Rex v. Philips, in Carmarthen, Trin. 1748*, is an authority to say that a *by-law* contrary to the charter is *not good.*

Here, all persons, in general, intitled to be free of ANY company, were before the making of this *by-law*, intitled to their freedom of the city: whereas this *by-law* expressly *confines* these persons to be free of the *particular* company of BUTCHERS.

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The case of *Robinson v. Gros court*, in 5 *Mod.* 104. is good law, notwithstanding the case of *Wannel*, abovementioned.

Secondly, It *injures* all the *other* companies in the city. Particular customs of the city may indeed be *regulated*: but *ancient franchises* can not be *extinguished* or *dissolved* by a by-law. Now this by-law is *injurious* to all the other companies.

Thirdly, It *restrains trade*. This by-law *narrows the privilege*, and is an *injurious restraint* to trade and traders, and a *clog to their liberty*.

But it will be said, "That the mayor and aldermen have a *power, by the custom*, to do this." To which I answer—the custom does not empower them to go so far as this by-law carries it: here is an *additional expence* laid upon persons intitled to their freedom.

He mentioned 5, 6 *W. & M. c.* 10, § 6. which obliges every person free of any of the companies, who shall take an apprentice, to bind him before the master and wardens of the company, whereof the master is a member; which apprentice, at the time of his binding, is to pay them two shillings and sixpence: and cited 1 *Ro. Abr.* 364. title, *by-law*, Pl. 5. in the case of *Payne v. Hawghton*, a by-law (about carmen and the hospital) holden void, because only for *private benefit*.

Second general objection—If the mayor and aldermen and common council really had power to make such a by-law as this is, yet the CAUSE here assigned for making it is *insufficient*.

Their by-laws must be made for the *common good* of the citizens; where any ancient custom is *difficult* or *defective*; or any thing, *newly arising*, wants amendment.

But this by-law is not agreeable to any of these requisites.

The return does not pretend that this company of butchers have any *power of regulation* over the members of their own company. *Here, nothing is suggested, but the *diminution* of the *company of butchers*, and the danger of *their falling into decay*: and the *increase* of *their profits* is the only view of the by-law. So that this is *not* a by-law made for the *common benefit* of the *corporation*: the other companies are injured. (He here mentioned Sir *Thomas Raym.* 446. *Taverner's case*.)

And

* N. B. *Wan-*
nell's case being
here cited from
8 *M.d.* 267.
The court treat-
ed that book
with the con-
tempt it de-
serves: and
they all agreed
that the case was wrong stated there. (I mean the old edition of that book.)

And no general grievance appears to have happened, to have occasioned the making of this by-law.

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HARRISON.*

Therefore he concluded, that it was, upon the whole, a *bad* one.

Mr. *Eyre*, *contra*, for the return, argued that this was a *good* by-law.

First—It is *within the jurisdiction* of the makers of it.

Secondly—The *cause* of making it is a *sufficient* one.

First—It does *not exceed their jurisdiction*.

First, It does *not vary* any *essential* point of their constitution: it is only a *regulation*.

Every man intitled to the freedom of a particular company may be admitted to the freedom of the city, *as easily* as before. The right remains, *in substance*, as it was before: it is only *regulated*. Therefore it is not like the case of *Rex v. Philips*.

4 Co. 77. b. the case of corporations, proves that this is *not* varying the constitution.

Secondly it is *not injurious* to the *other* companies. It *only* reduces them to their *original institution*.

Thirdly, It is *not an unlawful restraint* of trade in general, of the privileges of particular persons. It does *not exceed the custom*.

No *additional expence* appears upon this return. On the contrary, there is a provision against it.

The statute of 5, 6 W. & M. c. 10. § 6. makes nothing against us.

Nor is 1 Ro. Abr. 364. pl. 5. applicable to this case.

The customs of *London* are subject to a reasonable control by the corporation: and this is a reasonable control.

As to the second general objection—this by-law is agreeable to all the requisites. And the *cause* of making it is a sufficient and political one: it is to preserve the company of butchers

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butchers from falling to decay and being destroyed; and it will be attended with *public benefit*. It classes butchers by trade, in the particular company to which they *belong*: and the natural tendency of it is to *regulate* that company.

The case of *Wannell* against the chamberlain of *London* was a solemn opinion, in a case similar to the present; and in which the case of *Groscourt* was considered and over-ruled.

The reasons of making this bye-law are *not confined* to those particular and specific ones which are mentioned in the preamble of it.

Mr. *Vates*, instead of replying, conceded, that if the case of *Wannell* was to be considered as an authority in point; and if the only objection in that case arose from a circumstance which does not exist in this; it would be useless for him to pretend to reply.

* It was determined in *Michealmas* term 1725, 12 G. 1. when the reso-

lution of the Court was delivered by Sir Robert Raymond then Lord Chief Justice. It had been twice argued. The first argument was in Lord Chief Justice *Pratt's* time: who held the by-law to be reasonable, in respect of its tending to prevent frauds; and said, that "The only difficulty was, whether *Wannell* had a right to demand his freedom in the joiners company;" having served a master who was not free of the joiners company, but of the merchant tailors. But the Court, after hearing a second argument, and taking time to advise, held "That a man-
damus would lie to the joiners company, to admit him." My note of this case of *Wannell*, is agreeable to Sir John Strange's report: it was upon a mandamus directed to Sir George Ludlam, then chamberlain of *London*.

This is a *regulation* of a very *extensive* trade, that concerns every body who eats in the city of *London*.

It is not necessary that *all* the reasons of the by-law should be given in the *preamble* of it.

Mr. Justice DENISON—the case of *Wannell* was determined to the satisfaction of every body at that time: and I took the point to be thereby settled.

And this is *not an alteration* of the constitution: but agreeable to and a true exposition of the original custom.

This case is as different from that of *Rex v. Philips*, as light and darkness. That by-law put the right of being elected into another set of men than the constitution required: whereas they could not alter the right to be elected. But
this

this is only regulating the trade to what is most right and reasonable, and restoring it to the true meaning of the custom.

1762.

I am extremely satisfied with the resolution of the case of *Wannell*.

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HARRISON.

I think this a very good by-law : and the objections are of no weight.

Mr. Justice FOSTER concurred in opinion, that this by-law only *restored the constitution* to what it originally must have been and ought to be ; and that it was right and reasonable, and must have been the meaning of the custom, " That each company should have the inspection of their own members."

Mr. Justice WILMOT quite concurred also. He said, the only doubt in *Wannell's* case turned upon the power of the joiners company to *refuse admitting* the man: but when that was gotten over, there was no more doubt.

Corporations were originally instituted for the regulation of trade: and every company must have had and ought to have the inspection and regulation of their own trade. It must be understood, *reddendo singula singulis*.

Therefore he was very clear, that this was *no innovation or alteration* of the constitution, but a *restoration* of it to its true and original institution.

Per Cur. (clearly and unanimously)

Let the RETURN be ALLOWED.

Rex versus Plunket, Esq;

Tuesday 29
June 1762.

AN ATTACHMENT had been granted against Mr. *Plunket*, upon the application of Sir *Thomas Frederick* (the plaintiff in an action brought by him against Mr. *Lookup*) for Mr. *Plunket's* not appearing to give evidence, in obedience to a *subpœna* regularly served upon him. Mr. *Plunket* swore upon his examination, " That Sir *Thomas* had undertaken to give him FURTHER NOTICE, if it should be necessary for him to attend: but that Sir *Thomas* neglected to do it. And he swore, " That he had been subpœnaed on a former intended trial of the same cause, and had then attended; but the said intended trial did not come on." He further swore, " That

Costs granted
upon an attachment for contempt.

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Trinity Term 2 Geo. 3. B. R.

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PLUNKET.

"he would have attended, if he had received such further notice from Sir Thomas, to do so."

Whereupon I reported "That he had cleared himself of the contempt." And it appeared to the court, that the complaint against him was groundless and unreasonable, and must have been known to the prosecutor himself to be so.

THE COURT, after declaring it to be contrary to their general course and practice, to give costs to persons who had purged themselves of contempts upon their examinations, in consequence of attachments which had been granted against them by the court, on cause shewn; yet thought that it ought to be done in this particular instance; because the prosecutor must, within his own knowledge, be satisfied that this complaint was ill-founded and vexatious.

Therefore they ordered that Sir Thomas should pay costs to Mr. Plunket.

Rex versus Inhabitants of Stockland.

See this case abridged in the table; and at large in the quarto edition of my SETTLEMENT CASES, No. 163. page 508.

(1 Black. Rep.
378. S. P.)

Wednesday
30th June 1762.

Evidence of partiality must be extremely strong, to change the venue in a criminal information.

Rex versus Harris et al.

MR. Stowe and Mr. Selwyn shewed cause against the following rule, which had been made on the motion of Mr. Ashurst, viz.

"Wednesday next after fifteen days from the Holy Trinity, in the second year of king George the third.

"CITY of Gloucester: UPON reading the affidavit of the king against Gabriel Harris and two others, it is ordered that Tuesday next be given to the defendants, to shew cause why this cause should not be tried at the next assizes to be held in and for the COUNTY of Gloucester, by a JURY of the said COUNTY of Gloucester, instead of the CITY; upon notice of the said rule to be given to the said defendants in the mean time."

The affidavit, upon which the rule was obtained, went no further than to swear generally, "That they verily believed that

“ that there could not be a fair and impartial trial had by a
“ jury of the city of Gloucester;” without giving any parti-
cular reasons or grounds for entertaining such a belief.

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REX v.
HARRIS & AL.

The cause to be tried was an *information* against the defendants (as aldermen of Gloucester) for a misdemeanor, in refusing to admit several persons to their freedom of the city; who demanded their admission, and were intitled to it, and, in consequence of it, to vote at the then approaching election of members of parliament for that city; and whom the defendants did admit, *after* the election was over; but would not admit them *till after* the election, and thereby deprived them of their right of voting at it.

The prosecutors had moved for this rule, on a supposition “ That the citizens of the city could not but be under an influence or prejudice in this matter :” though there was, in fact, a list returned up to the proper officer, of above six hundred persons duly qualified to serve on the jury.

The cause now shewn by Mr. Stowe and Mr. Selwyn on the part of the defendants, against trying the matter by a jury of the COUNTY at large, instead of a jury of the CITY, was, that this was an application both unprecedented and ill-founded. For that, as this information was a criminal proceeding, it was local and must be tried by a jury of the county where the fact arose: and if that were not so, yet here is no kind of reason shewn for going out of the ordinary course, but mere unsupported imagination.

In the case of the mayor of Poole v. Bennet, in 2 Sir J. S. 784. The action being laid in the county of the town of Poole, for a duty claimed to be due to the corporation; and it appearing manifestly, that there could be no fair trial in Poole; the venue was indeed changed to the county of Hants. But that was a civil action.

In the case of the king against Clendon, in 2 Sir J. S. 911. An information was laid for an assault in Middlesex: and the court refused to amend it, by laying it in London.

Rex v. Burton et al, Tr. 1754, 27, 28 G. 2. B. R. was an information for a false return to a mandamus, laid in the town of Nottingham: and the court refused to change the venue from the town to the county of Nottingham, or to any other county, (though it was sworn there was not a sufficient number of freeholders in the town, who were not burgesses;)

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because

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because it was a *criminal* proceeding, and the cause ought to be tried where the *facts* arose. And yet that information might have been originally laid in *Middlesex*.

The case of *Norwich*, *Clift's Entr.* 741. Pl. 2. was a civil action.

There is a vast difference between *civil* and *criminal* proceedings. In the *latter*, the court will not grant a rule to inspect books: it was refused last *Hilary* term, in the cases of *Rex v. Head*, and *Rex v. Heydon*, and in *Dr. Purnel's* case in *Hil.* 1748.

Mr. *Aspburst*, supported by Mr. Solicitor-General and Mr. *Morton*, argued on behalf of the prosecutors, for making the rule absolute.

They denied that there was any distinction, in *this* respect, between *civil* and *criminal* proceedings. An indictment may be removed by *certiorari*, out of a county where a fair trial can not be had, to be tried in one where it may. And they urged, that here must be a *failure of justice*, if it was not done: for, here are *no* persons in the city of *Gloucester*, who are impartial and unprejudiced. The affidavit, "That it is *verily* believed that an impartial and fair trial can not be had by a jury of the city," stands uncontradicted; and must, therefore, be taken for fact and truth.

Burton's case was an application by the prosecutor to change the *venue*, in an information for a false return to a *mandamus*: and the refusing to change the *venue* did not occasion a failure of justice *there*; because the prosecutor of the *mandamus* might bring his *action* for a false return. Whereas *here* must be a failure of justice: which shall never be suffered. The case of the mayor of *Poole* against *Bennet* was determined upon this principle. And the case of *Norwich* also went upon this ground.

The present case is almost in point (they said) with that of *Norwich*: and there was the same suggestion as they now make.

Therefore they concluded with praying to have their rule made absolute; and that they might have liberty to enter a suggestion on the record, (as was done in that case,) "That there can not be a fair and impartial trial had in the county of the city;" and therefore prayed that the *venire* may be directed to the sheriff of the county of *Gloucester*, to return a jury out of the county at large. [*V. Clift's Entries*, p. 741. title,

title, *venire facias*, pl. 2. *Calumnia juratorum civitatis Norwici.*] So, in the *Berwick* causes, a suggestion was entered on the roll. [See it in the preceding volume, page 863.]

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Lord MANSFIELD—No two things can be more different than *changing* the *venue*, and *continuing* it as it was, with such a suggestion on the roll as is now proposed. In the *Nottingham* case, *Rex v. Burton et al'*, the motion was, "To *change* the *venue*:" this is, "To enter a *suggestion* on the roll, with a *nient dedire*."

Notwithstanding the locality of some sorts of actions, or of informations for misdemeanors, if the matter can not be tried at all, or can not be fairly and impartially tried in the proper county, it shall be tried in the *next adjoining* county. The case of *Berwick* was determined upon the foundation—"That the writ of *venire facias* did not run there." And so it is likewise in the cinque ports. In *these* cases, there could otherwise be no trial had at all. That of *Norwich* was a case where, in respect of the particular circumstances, there could not be a fair and impartial trial had by a jury of that city.

But, as the party can not traverse such a suggestion, when entered by a rule of court, there must be a *clear and solid* foundation for it.

Now, in the present case, this *general* swearing to *apprehension and belief only*, is *not* a sufficient ground for entering such a suggestion; especially, as it is sworn on the *other* side, "That there is a list returned up, consisting of above six hundred persons *duly qualified* to serve."

Surely, a person may espouse the interest of one or another candidate at an election, without thinking himself obliged to justify, or being even inclined to defend, the *improper* behaviour of the friends or agents of such candidate:

This question to be *now* tried, is no general question of right, or a general question that can affect the corporation *in future*, or by way of *example*: it is only, "Whether the present defendants, who were *not* the candidates, acted partially and unjustly, upon an occasion and in a matter where *THEY alone* are *personally* concerned;" and it is a mere *personal* charge upon them.

So that here is a *want* of *foundation in fact*, for such a suggestion: and therefore there is no reason for the court's granting what is now prayed.

H 2

Mr.

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Mr. Justice DENISON—the court will be cautious of admitting the entry of a suggestion which can not afterwards be contradicted.

It is true, that where an impartial trial *can not* be had in the proper county, the *venire* may be awarded to the *next* county. In a *Norwich* case, relating to a bridge, the city of *Norwich* and the county at large being *both interested*, the *venire* was therefore awarded into *Suffolk*.

But there ought to be the *clearest evidence* in the world, to ground such a suggestion upon; or it must arise out of the record itself.

Now here it does *not* arise out of the record; *nor* is there a sufficient ground to support it.

The case of the king against *Burton* and others, in *Nottingham*, was a motion to *change* the *venue*. In this method of entering a *suggestion* upon the roll, the *VENUE* remains; and the court only award the *venire* to the next adjoining county; but they ought *not* to do it in *this* case; because the place of trial ought not to be altered from that which is settled and established by the common law, *unless* there shall appear a clear and plain reason for it; which can not be said to be the present case.

Mr. Justice FOSTER was of the same opinion.

Here is *no fact suggested*, to warrant the conclusion “That there can not be a fair and impartial trial had by a jury of the city of *Gloucester*.” It is a conclusion *without premises*. The *reason given*, or rather the *supposition*, would hold as well, in all cases of *riots at elections*.

This is no question relating to the *interest of the voters*: it is only, “Whether the defendants, the persons particularly charged with this misdemeanor, have *personally* acted corruptly or not.”

Mr. Justice WILMOT concurred.

There was no rule better established, he said, than, “That all causes shall be tried in the county, and by the neighbourhood of the place, where the fact is committed.” And therefore that rule ought never to be infringed, *unless* it plainly appears that a fair and impartial trial can not be had in that county.

Where that does *plainly appear*, he said he had no doubt of the court’s having *power* to depart from the general rule.

The

The case of the king against the inhabitants of the county of Nottingham, in 2 Lev. 112. was a question upon the right of repairing a bridge, there the information brought against them for not repairing it, was tried at the bar, by a *Middlesex* jury. That was done by *consent*: and it was a sort of civil right that was to be tried. However, if it be considered as a criminal case, *all the inhabitants* of the county were interested,

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The true rule about suggestions entered upon the record, is "That the *FACTS* proving that a fair and impartial trial can not be had in the ordinary course, must be *themselves suggested upon the record*." Whereas, here, it is only a conclusion *without* premisses; it is only *supposed, conjectured, They verily believe*, that there can not be a fair and impartial trial by a jury of the city, nor, in the *nature of the thing*, can such a suggestion be credited. It does not follow, that because a man *voted* on one side or on the other, he would therefore *perjure* himself, to favour that party, when sworn upon a jury. God forbid! the freemen of this corporation are not at all interested in the *personal* conduct of these men upon *this* occasion: the same reasoning would just as well include all cases of *election-riots*.

Therefore, though he had no doubt, he said, of the *authority* and *jurisdiction* of the court, to award the *venire* into another county, upon a suggestion of facts clearly and fully proved to the court, shewing "That a fair and impartial trial can not be had in the county where the fact is laid;" yet he was as clear, that in *this* case there was *no sort of foundation* for such a suggestion being entered.

Per Cur—unanimously.

RULE DISCHARGED.

V. Dean and chapter of Gloucester versus Pitt et al, Trin. 1767.

Rex versus Pitt,

Rex versus Mead.

THE defendants having been convicted of *BRIBERY* at an election for members of parliament, upon an information granted by the court, as at *common law*; the court had a doubt about the *sentence* they should pronounce upon them.

(1 Black. Rep.
380. S. P.)

Sentence on conviction of bribery at the election of a member of parliament.

It was argued on Friday last, (the 25th of this instant June) by Sir Fletcher Norton, solicitor general, Mr. Morton,

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and Mr. Thurlow for the defendants; and by Mr. Serjeant Davy, Mr. Serjeant Burland and Mr. Popham, for the prosecutor.

The counsel for the defendants argued, that this court had no jurisdiction at common law, to punish bribery at elections to parliament. There is no instance of any such judgment given by this court: which proves that there can be none given by them.

The House of Commons are the proper judges of this matter. 4 Inst. 23. Thomas Long's case, of Westbury, was adjudged in the house of commons, *secundum legem et consuetudinem parliamenti*: and the mayor was fined and imprisoned; and Long, removed.

Lord MANSFIELD—That was for a contempt; in which case the house of commons had jurisdiction. The latter part can not be true: there could be no fine set there; it must have been in the star chamber.

The counsel for the defendants proceeded.

If this court can give any judgment at all, it can be no more than a judgment "*Quod convictus est*;" as the two years limited by the * statute are not yet expired. For, otherwise, the party might be liable to a double punishment for the same offence: since any common informer may still bring an action, being within the time limited; and the offender will after judgment be liable to the penalty of five hundred pounds, and also to the disabilities mentioned in the † statute.

In Rex v. † Luckup, 2 Sir J. S. 1048, upon the gaming act, the judgment was only "*Ideo convictus est*:" and that was after argument and consideration.

Here, indeed, the action may be brought for the penalty of five hundred pounds, without such a judgment.

The court may therefore, in the present case, either give this judgment "*Quod convictus est*;" or postpone and suspend the giving any judgment, till after the expiration of the limited time.

At least, the punishment ought to be greatly mitigated, in case the court should now give any judgment at all.

The counsel pro rege said the statute of 2 G. 2. c. 24. does not take away the offence at common law; it only inflicts a

new

* 2 G. 2.
c. 24.

† V. 2 G. 2.
c. 24. § 7.
and § ult.

‡ His name
was Luckup;
and his coat of
arms is an eye
in base, looking
upwards,

new further penalty: Therefore the court may now inflict the common law punishment: the legislature have only inflicted an additional one. The punishments inflicted by this act are cumulative. *Queen v. Wigg*, Salk. 460. *Harok*. P. O. 178. And they cited 2 *Hall's Hist.* P. O. 191. to prove that the party may still be indicted at common law. But they made a doubt whether an action could be brought upon the statute, after a judgment given against the defendant at common law.

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This is now to be considered in the same manner as if it were a conviction upon an indictment: for, whether the court had thought proper to grant an information or not, yet the same conviction might have been obtained upon an indictment. However, it appears by the words of the statute itself, ("Or being any otherwise lawfully convicted thereof,") that an information might properly be granted within the limited time of two years.

Lord Coke in 2 *Inst.* 200. (upon *W. 1. c. 26, de malefactoribus in parvis*,) says, it is a maxim in the common law, "That a statute made in the affirmative, without any negative expressed or implied, does not take away the common law."

Lucas 336. The *King* against *Dixon* and his wife, an indictment for keeping a gaming-house is in point. That was laid "Contra formam statuti," and was brought within the time limited by the statute for bringing the action for the penalty.

In 6 *Mod.* 42. *Regina v. Orbell*—There is no such objection; and yet it appears by the record, that the indictment was brought within the limited time.

In *Rex v. Wolfson, Fitz. Gibb.* 66. (for blasphemy,) the above-mentioned maxim was laid down. So in *Rex v. Robinson*, *Tr.* 1759. 32, 33 G. 2. B. R. Yet there the parish might have proceeded for the allowance. [*V. ante*, p. 799.]

The act of 2 G. 2. c. 25. does not take away the common law proceeding for perjury.

Though the reasons urged might be an objection against actually punishing them a second time, yet the mere apprehension of a second punishment is no reason against punishing them once.

In 2 *Showers*, 30—*Rex v. Stanton*, judgment was given for the king upon the information, though an action lay for the party.

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And very few prosecutions are commenced at common law for the facts punishable by such acts of parliament as this is.

The counsel for the defendants replied, that though a prosecutor may have an ELECTION of one of two remedies, yet that does not at all tend towards proving "That he shall have both." It is contrary to the law of this country; it is contrary to natural justice, that the party should be twice punished for the same offence. And this judgment now prayed against the defendants, would be no bar to an action in a civil suit.

"*Ideo convictus est*" is the proper judgment. The disabilities will follow it: and the party will remain open to an action for the penalty. The judgment ought to be general: the disabilities only follow as a consequence.

This case differs from the cases that have been cited; and is not at all like cases of a person being liable to both civil actions and criminal prosecutions for the same matter: for, they are *diverso intuitu*; whereas these are both of them penal.

THE COURT directed an inquiry, "Whether, since the act of parliament, the propriety of granting informations before the time limited for bringing an action upon the statute, was expired, had been solemnly considered."

Upon examination, it came out "That no objection had ever been made, upon the ground of the penalties introduced by the act: where the affidavits were full, the rules had been made of course."

LORD MANSFIELD now delivered the resolution of the court.

He premised, that wherever a practice, which is wrong or unreasonable, has happened to have been introduced, for want of a sufficient advertence to the consequence of it, the best way is to set it right immediately as soon as the inconvenience is observed, if former cases be not affected by the retrospect.

BRIBERY at elections for members of parliament must undoubtedly, he said, have always been a CRIME at common law; and, consequently, punishable by indictment or information. But the act of 2 G. 2. c. 24. has introduced a very severe penalty; in order to enforce the laws then already in being, and because they had not been sufficient to prevent the evil. It enacts in the seventh

seventh section.—“ That if any person claiming a right to
 “ vote, shall ask, receive, or take any money or other re-
 “ ward, or agree or contract for any, either to give his vote
 “ or to forbear voting, in any such election; or if any person
 “ by himself or any one employed by him, shall by any gift
 “ or reward, or by any promise, agreement or security for
 “ any gift or reward, corrupt or procure any person or per-
 “ sons to give his or their vote or votes in any such election;
 “ such person so offending shall for every such offence forfeit
 “ five hundred pounds (to be recovered as before directed,) *together with full costs of suit; and after judgment ob-*
 “ *tained against him in any such action of debt, bill, plaint or*
 “ *information, or summary action or prosecution, or being*
 “ *ANY OTHERWISE LAWFULLY CONVICTED THEREOF, shall*
 “ *for ever be disabled to vote in any election to parliament, and*
 “ *also to hold any office or franchise as a member of any*
 “ *city, burrough, town-corporate or cinque port, as if natu-*
 “ *rally dead.” And the last clause limits the prosecutions to*
 “ *be within two years.*

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It is true that some informations at common law have, *since*
 the commencement of this act, been applied for and granted
within the two years. But it now appears, upon looking in-
 to the matter, that the granting such informations at the suit
 of a prosecutor, *subsequent to the making of this act of parlia-*
ment, was a point never litigated or argued, or particularly con-
sidered: it probably was thought warranted by *Spinage's case,*
 in the burrough of *Abingdon;* * which, very likely, was ap-
 prehended to be a *precedent for it;* though, in fact, it was
 not a precedent for granting *these informations for bribery at*
elections of members to serve in parliament; being, as it ap-
 pears now it comes to be looked into, *only for bribery at*
the election of a mayor of the corporation. In such infor-
 mations as are carried on by private prosecutors, the *costs*
 stand upon a very different foot from the costs given to those
 who sue upon *this statute:* this act gives the person who re-
 covers the penalty, *full costs of suit.*

* P. 1754. 27
G. 2. B. R.

This crime certainly still *remains a crime at common law.*
 The legislature never meant to *take away* the common law
 crime; but to *add a penal action.*

This appears by the words, “ or being any *otherwise law-*
 “ *fully convicted thereof:*” and we are all of us clear,
 “ *That it still remains a crime at common law.*” And the pre-
 sent conviction, upon an *information granted by the court,* is
 just the same as if the defendants had been convicted upon
indictment.

But

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But this case has raised a great doubt in our minds, upon the propriety of granting informations *within* the two years.

The shewing cause, and the trial, may be auxiliary to the penal action. *After conviction*, the court is under a great difficulty "what punishment to inflict;" not knowing whether the penal action may follow, or not.

As at present advised, we all think, that, *in general*, the court never ought to interpose by information.

After judgment for the penalty, they certainly would not interpose, to grant a second prosecution in an extraordinary way, by information.

By parity of reason, it ought not to be granted while the person is *liable* to such judgment.

If there is evidence to *convict*, there is evidence to support the *action* of a common informer.

There may possibly be *particular cases*, founded on particular reasons, where it may be right to grant informations, *before* the limited time for commencing the prosecution is expired: but the present case is not one of them. And the court now considers these two defendants as *remaining still liable* to the forfeiture and disabilities directed by the act of 2 G. 2. as the time limited for commencing prosecutions upon it is *not yet expired*: and therefore in adjusting the punishment which ought at present to be inflicted upon them, they do *not* consider it as a punishment *adequate to their offence*; but as an *additional* punishment, *over and above* the punishments inflicted by the act of parliament; to which statute-punishments they *still* remain liable.

Therefore, since both of them have *already* suffered imprisonment for some time, they only order that

PITT be imprisoned for six months longer;

and

MEAD, for three months longer.

V. *post*. 1359, 1389, and Rex v. Smith, Esq; and Rex v. Brand Hollis, Esq; Pasch. and Trin. 1776, 16 G. 3.

The End of Trinity Term 1762. 2 G. 3.

Michaelmas

Michaelmas Term,

3 Geo. 3. B. R. 1762.

Governor and Company for smelting down
Lead, &c. *versus* Richardson, Esq; and Others.

(1 Black. Rep.
389. S. C.)

Friday 12 Nov.
1762.

THIS was an action of trespass, for taking goods by way of distress; tried in *Cumberland*; and a verdict for the plaintiffs, subject to the opinion of the court upon a case reserved; the state of which, was long; but the QUESTION contains all that is necessary to be reported.

Lead mines not
rateable to the
poor.

It was, "Whether the plaintiffs, *lessees* of certain LEAD-MINES in the parish of *Aldstone* in the county of *Cumberland*, rendering as rent a certain part of the lead-ore gotten thereout, were liable, in respect of the said lead-mines, to be rated to the relief of the poor.

This case was first argued on *Tuesday* 15th of *June* 1762; by Mr. Clayton for the plaintiffs, and Mr. Yates for the defendants.

Mr. Clayton, on behalf of the plaintiffs, argued that they were not liable to be rated, upon the facts stated in this case.

They are not within 43 *Eliz. c. 2.* which, in naming the persons rateable, mentions occupiers of *coal-mines*, but avoids the mention of any other sort of mines.

Lead, tin, or copper-mines are wholly fluctuating and uncertain, as to profit or loss: they may happen to produce no profit at all to the adventurers; nay, they are very frequently *detrimental* to those who hire and work them. And it is not stated, that these lead-mines produced any profit to the *lessees*, though they did to the *lessors*. And therefore lead, tin and copper-mines pay to the *land-tax*, which is a charge upon the landlord;

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landlord; whereas the poor-tax is a charge upon the lessee, who may be a loser, instead of a gainer. But the reason why lead, tin and copper-mines pay even to the land-tax is because they are *expressly* mentioned and specified in the land-tax acts.

Lead-mines have never been used to be taxed. They are not taxed in the counties of York, Durham, Northumberland, Cumbria and Derby, nor in North Wales; nor the tin-mines in Cornwall. And these recent instances in 1757 and 1758, and 1760 and 1761, are of no sort of weight.

The expences of these mines may exceed the profits: and the profits are, at best, uncertain, casual and precarious; and as much so, as the heriots and other casual profits of a manor; which were determined not to be rateable to this tax, in *Rex v. Vanderwall*, P. 33 G. 2. B. R. [*V. ante*, p. 991.]

Mr. Yates, *contra*, for the defendants, argued that the occupiers of lead-mines are **LIABLE** to this rate.

They are equally within the reason and meaning of 43 Eliz. c. 2: as coal-mines are: and that act only names coal-mines by way of *instance or example*; but intends to take in all other mines also. So, when executors only are specified in an act of parliament, it shall nevertheless include administrators: and where the warden of the *fleet* only is particularly named, yet it shall be extended to all gaolers.

The land-tax act speaks of mines in general: and the act of 17 G. 2. c. 37. (relating to improved wastes and drained marsh-lands) after reciting the words of 43 Eliz. (which are "occupiers of coal-mines," repeats them in the enacting part by the general term "MINES."

COAL-mines are as uncertain and precarious, as other mines: and yet they are specifically made liable. Even *tithes* are fluctuating in their value.

If any of these are rated, at times when they are not profitable, the proper remedy is by way of *appeal*.

THESE mines may bring in an immense profit: and they certainly introduce many poor into the parish.

PROFITS OF MANORS are not annual profits; no more are the profits of *timber*: but profits of a *market* are rateable to

to the poor. *Dalton*, cap. 73. p. 165. So are all things that yield a yearly revenue.

Mr. *Clayton*, in reply, enforced what he had before urged; and observed, as to 17 G. 2. c. 37. that it refers to 43 *Eliz.* And therefore the general word "*mines*" must be understood only of *such* mines as are *therein* specified, *viz.* coal-mines.

THE COURT and COUNSEL agreed that it must be determined upon the general question, "Whether lead-mines are rateable to the relief of the poor."

Lord MANSFIELD said that this was a very extensive and general question, with regard to the property of many persons in the kingdom; and would have it argued again: and he wished that the *fact* of rating even coal-mines might be inquired into. If they be not always rated, it must arise from some *other* reason than the construction of the act of parliament.

Mr. Justice WILMOT mentioned an act of parliament made in same reign (31 *Eliz.* c. 7.) where the legislature speak of "*any* mineral works, coal-mines, quarries, &c."

Uterius Concilium.

N. B. The certificates, procured subsequent to the foregoing argument, tended, in general, to shew "that it was *not* the usage, "to tax lead-mines."

Lord MANSFIELD now, upon a second argument, stated the question (for the observation of the bar) to be this;—"Whether the plaintiffs, who are *lessees* of LEAD-mines "within the parish of *Aldstone*, who pay NO RENT, but only "a CERTAIN PART of the ORE raised, are liable, in respect "thereof, to be rated to the relief of the poor."

Mr. Solicitor General (Sir *Fletcher Norton*) for the plaintiffs, at present, only stated the case.

Mr. *Morton*, *contra*, for the defendants (the justices and parish officers) insisted that the *uncertainty of the profit to the landlord* made no difference as to the *lessee*.

He argued that lead-mines were rateable; and urged, that coal-mines were only mentioned by way of *example*, in 43 *Eliz.*

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and Others.

The case of *Rex v. Vanderwall* is not at all, he said, applicable to *this* case: *that* case went upon *another person's* having been *already* rated for the casual profits; and not upon the *uncertainty* of the profits. There, the same fund was taxed *twice*.

The surface of the ground is lessened in value, by the working of the mines, consequently, if the surface be taxed at less than it used to be, the complement ought to be made up by the tax upon the lessee of the mines. And the labourers in lead-mines equally gain settlements, as other servants of the like kind do.

Lord MANSFIELD prevented Mr. Solicitor General from replying: for that the case was too plain to need it.

He stated the question, as above; and observed that the words of the act of 43 *Eliz. c. 2.* are "*coal-mines*," not mentioning any *other* kind of mines: and that is equal to an express exception or exclusion of all *other* mines. For, *coal-mines* are not lead-mines, tin-mines, copper-mines, iron-mines, or any other but coal-mines: and there were, at that time, *other* mines in this county.

These *other* mines are governed by particular laws. The worker of them is not always the owner of the soil. The particular laws of them give the right of working (under certain regulations and conditions) to other persons than owners or lessors, or persons having any right of property in them. *This* alone might be a sufficient reason to except them out of this act of parliament. And as there *may* be a reason for the *strict* letter of the statute, and *none* appears for extending it beyond the letter, we have no ground, or authority, or pretence for giving it that *extensive* construction; nor is there any foundation for imagining that the legislature *meant* so.

And the fact, upon certificate (though the certificates do not exactly concur in every particular) appears to be "That *lead-mines* are *not* rated throughout *England*; and particularly in *Derbyshire*, *Somersetshire* and *Cornwall*." And my brother *Adams*, who was desired by us to inquire, gives the same account, upon his return from the Western circuit, with regard to the tin-mines in *Cornwall*.

I am now keeping clear of *inhabitaney*, which is no part of this case: for, these persons are not rated as inhabitants, but only as *lessees*.

There-

Therefore the *possea* ought to be delivered to the plaintiff.

Mr. Justice DENISON concurred—In the 43d of *Elizabeth*, coal mines are put as an *exception*, not as an example. The specifying *them* excludes other sorts of mines.

Mr. Justice WILMOT also concurred—*Lead-mines* and coal-mines essentially differ as to the expence of *finding*; though not so much, in the expence of *working*. There is infinite expence and uncertainty in *finding* lead-mines. They are governed by particular laws: and the finder is obliged to pay certain proportions to the owner of the land.

Therefore it is reasonable that *lead* mines should *not* be put upon the same foot with coal-mines; because there is so much greater risque in the search after them; even so much, that a man may be ruined by it, instead of succeeding.

The legislature have not, in this statute, mentioned lead-mines, but only coal-mines: and *expressio unius est exclusio alterius*. There is no reason to think they *meant* to include them.

Therefore this case is not within the words or meaning of that act. And I think this is confirmed by the act of 31 *Eliz. c. 7.* against the erecting and maintaining of cottages; which excepts * “cottages for the habitation of workmen” and labourers in any mineral works, coal-mines, quarries, “&c.” So that when they had it in contemplation, they specified them particularly.

Therefore I am clear that this act of 43 *Eliz. c. 2.* does *not* extend to *lead-mines*.

Per + Cur’.

Let the *possea* be delivered to the PLAINTIFFS.

Bird *versus* Randall.

THIS was a case reserved at *nisi prius* at Guildhall, upon a trial before Lord Mansfield, in an action upon the case wherein a verdict was given for the plaintiff, and twenty pounds damages assessed; but subject to the opinion of the court, upon a case stated.

(1 Black. Rep. 373. 387. S. C.)
Tuesday 16 Nov.
1762.

No action lies for seducing a servant from his master, who had paid the penalty stipulated by his articles for leaving him.

The

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* V. § 5.

+ Mr. J. Foster
was absent.

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BIRD V.
RANDALL.

The substance of the case stated was shortly this.

The plaintiff *Bird* and one *Mary Hogg* were silk-dressers, and partners in trade. And articles of agreement were entered into between the plaintiff *Bird* and one *Burford*, dated 25th of *August* 1760; whereby *Burford* covenanted with *Bird* to serve the plaintiff *Bird* and the said *Mary Hogg* and the survivor of them, as a journey-man in their said trade and business of silk-dressers, for five years from the date; and to work at the usual and accustomed hours daily, and not to discover the mysteries of the trade, or the secrets of the plaintiff and his said partner: and *Bird* covenanted to pay *Burford*, weekly twenty shillings a week for his work. And for the true performance of all and every the covenants and agreements contained in the articles, each party bound himself to the other in the PENALTY of one hundred pounds.

The case then goes on, and states that *Burford* accordingly entered into the said service, under the said articles; and that he continued therein till 19th of *September* 1761; when the defendant, knowing of the said articles, persuaded, procured, and ENTICED him to depart from and out of it: and he accordingly did so; and never returned again into it.

It further states that the plaintiff *Bird*, in *Trinity* vacation 1761, and before the commencement of the present action against *Randall*, brought an action of DEBT against *BURFORD* for the penalty of one hundred pounds for his departing out of the said service; and obtained a verdict and judgment against him in the said action, and recovered the said money, with costs: but the said monies (the debt and costs) so recovered were not actually paid to him by the said *Burford*, till the 29th of *March* 1762; which was AFTER the commencement of the present action, but before it came on to be tried.

The present action, (which is an action of trespass upon the case,) is brought by the SAME PLAINTIFF *Bird*, against the present defendant *RANDALL*, for the ENTICING and SEDUCING the said *Burford* out of the plaintiff's service.

The question was, "Whether the present action be maintainable or not, under the circumstances of this case."

It was first argued on *Tuesday* 22d of *June* 1762, by Mr. *Stowe*, for the plaintiff, and Mr. *Ashburst* for the defendant; and again, on *Friday* the 12th of this month of *November* 1762,

by

by Sir *Fletcher Norton*, solicitor-general, for the plaintiff, and Mr. *Morton* for the defendant.

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Upon the first argument, the court did not declare any opinion; but only threw out some doubts, by way of breaking the case; and desired to hear it argued again.

Mr. Solicitor General—The question is, whether the plaintiff, who has already recovered the penalty against the *servant*, can bring this action against the *seducer*.

He agreed, "That if the plaintiff had once received a *full* satisfaction for the *same* thing, he could not recover a *second*." And also, "That a recovery of a penalty upon a deed is a full bar to an action to be brought *upon* that deed." But he said, it must be allowed to him, that the party, to whom the deed is made, may bring either covenant or debt, at his election; and that a jury, in an action of *covenant*, even upon such a deed where there is a penalty, are *not* confined to give damages *within* the penalty, but may go *beyond* it.

He repeated his concession, "That a person who has once recovered a *full* and *complete* satisfaction from one man, shall not recover it again against *another* for the *same* thing; as upon indorised notes; or upon trespasses committed by several persons; or upon a rescue and escape; or, the penalty on breach of a covenant in a lease; or in an action of waste.

But he denied that here *has been* a FULL satisfaction or recompence for the *same* thing.

A seduction of a covenant-servant is undoubtedly a good cause of action against the *seducer*: and it arises *ex delicto*, *ex maleficio*. But the ground of action against the *servant* himself arises *ex contractu*.

Therefore a recovery in an action for a *breach of contract* against one person, can not be a bar to an action against another for a TORT.

Bars must be *reciprocal*. But the *servant*, in a subsequent action against him, could not have made use of a recovery against the *seducer*: neither, therefore ought the *seducer* to make use of the action against the *servant*. It is not a full satisfaction according to the circumstances of the case.

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If an offender in *perjury* be punished, that shall not hinder the *suborner* from being punished too.

The action against the servant, and that against the seducer are *diverso intuitu* : and the recovery in one can not be a bar to the other.

There are cases to this effect ; though not in point.

In case of an action brought against me by the instigation of a third person, or of a violation of my property ; I may have a remedy not only against the injurer, but also against the instigator. *Aleyn 3. Newman v. Zacharay, M. 22 C. 2.* And a case there put by *Hale* of slander of title ; where the person whose title is slandered, shall have an action against him that caused the disturbance, though he has remedy against the trespassor. A recovery is no bar, unless it be a recovery of the *same* thing ; a satisfaction for the very *same* injury. So it is on notes of hand : so, on torts ; it must be the same trespass. Whereas here, the cases of the two defendants, the *servant* and the *seducer*, are very different : the injuries are different injuries.

Besides, at the time of bringing the present action, there was *no actual satisfaction* had : for, though there was judgment, there *was no execution*. Therefore it ought to have been *pleaded*. But what has arisen since the commencement of the action could not be given in evidence in *bar* of it ; though it might, in *mitigation of damages* : and they *have had* the benefit of it, in *mitigation* of damages.

It has been said, " That this was *damnum sine injuria* ?" which I deny. For, damages were here *proved* : And if they had not, the law would *imply* an injury, whether it could have been directly proved, or not.

It is not like erecting a new building, so as to stop the lights of a house. Here, the seduction itself was a wrong and an injury to the master.

It has been said, " That the servant was *only liable to one hundred pounds penalty* : AFTER paying which, any man " might hire him." To which, I answer, " he could not do " it, *whilst* the servant was under the unexpired contract " with the former master."

Mr.

Mr. *Morton*, *contra*, for the defendant, argued that the recovery against *Burford* the servant was a *full* and *complete* satisfaction for the injury done to the plaintiff: and he has made his *election*, to bring his action against *Burford* for the *penalty*; which is the *stipulated quantum* of the damages for the breach of the contract, and can not be exceeded. 'Tis like a *nomine pœna*, for plowing up sward-land: and *Burford* could not have been *relieved* against the penalty recovered; neither could *Bird* have any *further* satisfaction. He has already received *all* the satisfaction stipulated: and he cannot shew any *further* damage.

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In trespass, there shall be but *one* satisfaction for *one* injury; though several parties are concerned in doing the injury; a recovery against *one* of the trespassers, or a release to *one* of them, will be a bar. *Hob. 66. Cocke v. Jennor* is full and clear to this purport.

This has no analogy to *criminal* cases; which are only for example, not for satisfaction: therefore it is not applicable to the case of subornation of perjury. It is like the case of escape, in *Cro. Eliz. 237. Salteson and Offely v. Payne*; where satisfaction acknowledged upon record was a bar to the sheriff's action against the defendant who escaped. So rescuers shall pay nothing, where the debt is received: which he inferred from *Congham's* case, in *Hutton 98*. So here, the *stipulated damages* being received, the plaintiff can have no *second* cause of action *ex maleficio*.

I do not see how trespass can lie against the instigator of a trespass; for all are *principals* in trespass.

In slander of title, a man suffers a general loss, *superadded* to the particular damage by the ejectment.

In the cited case from *Aleyn*, there was *defamation*, as well as loss: and besides, there does not appear to have been any other satisfaction. Whereas, here has been other satisfaction received.

Upon Mr. Solicitor's reasoning, the plaintiff might recover against *several* persons, who might *successively* have employed *Burford*.

It was not necessary to *plead* this: any thing may be given in evidence, which shews that there is no cause of action in the plaintiff.

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On the following day, *Saturday 13th November*, Mr. Solicitor General proceeded to reply.

He agreed, that *as between* the master and the servant, the plaintiff has received satisfaction from the servant: and he supposed (though he knew no case to prove it) the master could not proceed further against *him* upon the covenant at large, after having elected to take the *penalty*. But this is no satisfaction for the wrong done to the master by RANDALL.

As to the case of *Coke v. Jennor*—A satisfaction was received, and a release was given to the joint-trespassor, for the *very same* trespass.

But, in the present case, there was *no actual* satisfaction really received, at the *time* when this action was brought: and the *mere recovery* is *not*, alone and of itself, a bar.

This case essentially differs from all those cases where the *same thing* has been recovered; which is the case of joint torts and joint contracts. *There*, it is the *same* individual injury; the *very same* thing, for which the damages are recovered: therefore the plaintiff ought not to recover twice, though he proceed by different species of actions. *Here*, it is the *seduction* itself that is the *gist* of the action; and *not* the *consequence* of the seduction. The damage arises out of the *nature* of the action. The nature of the case *implies* a damage; though perhaps none can be proved, or even though the servant was a very bad one. The consequential damages may be *more* or *less*, according to the circumstances of the case: but *some* damages there *must* be, however small.

As to Mr. *Morton's* objection, "That, upon the principles above laid down on the part of the plaintiff, the plaintiff might receive *several* satisfactions from *several* persons who might employ the servant during the unexpired term."—The answer is, *future* employers of the servant would *not* be liable; because they would *not* take him out of the plaintiff's service, but out of *another person's*. But this defendant seduced him out of the plaintiff's actual service.

As to the cases cited from *Hutton* and *Cro. Eliz.*—He did not deny the principle and doctrine of them; but they are not applicable, he said, to the present case.

Suppose

Suppose the master had *forgiven* the servant; or accepted a *private* voluntary satisfaction from him; yet he might have brought an action against the *seducer*: and that satisfaction received from the servant could not have been pleaded in bar; nor could it have been given in evidence *in bar* of such action against the seducer.

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Here was a *good* cause of action, at the *time* when the action was brought: for, the plaintiff had not *then* received *any thing* from the servant: and the *mere recovery* could not be given in evidence upon the general issue.

The COURT took time to consider, till this day. And now

Lord MANSFIELD delivered the resolution of the Court.

He previously observed, that it does not appear upon the case stated, that the plaintiff was under any difficulty of receiving the money recovered from *Burford*.

This case turned, he said, upon two points; 1st. Whether the plaintiff could have maintained this action against the defendant for seducing his servant, *if* the 100*l.* penalty before recovered by him against the servant himself had been *actually* received by him *BEFORE* the commencement of the present action against the seducer: 2dly. If it could not, then whether his *having received it* *SUBSEQUENT* to the commencement of the present action, be such a circumstance as will vary the case, so as to entitle him to *maintain* his action, which he could not have maintained, if the actual receipt had been *prior* to the commencement of it.

In the first place, therefore, he would consider the nature of these articles, and of all other articles with *penalties* annexed to the breach of them.

In every case of articles *with a PENALTY*, the party injured may, if he chooses it, have an *EQUITABLE* relief; so often and so far as he suffers injury; he may recover *partial* damages upon *partial* breaches, proportionable to the respective injuries done him, as often as the injuries are repeated: he may do this, *toties quoties*. So, in the present case, the master might have done, if the servant had left his service several different times, for a short space of time (as a week or a fortnight or month) at each departure; and had, every time

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returned again to his service; he might, upon this *equitable* remedy, have recovered partial damages against the servant, for *each* breach of his contract, in *proportion* to its degree, but *not beyond* it: and for *civil* injuries, a man ought not, in point of justice, to recover more than in proportion to what he has *actually* suffered.

Besides this *equitable* relief, there is, in these cases, a *fur-*ther election given to the party injured, "To proceed by the "*summum jus*, and by a *rigorous* remedy, for the PENALTY;" which is intended *in terrorem*, and by way of *punishment* for breaking the contract; which rigorous remedy may be taken for a very *slight* breach, and includes the idea of *more* than the damage actually sustained, certainly not of less.

But this *rigorous* remedy *can not be repeated*: for the PENALTY extends to the uttermost farthing that can *ever* be recovered for *all* and *every* of the breaches; and when the party injured has once got *all* that he could be intitled to have for *every* breach, there is an *end* of the articles, and consequently of all further remedy upon them.

It was candidly agreed, at *Guildhall*, by the counsel on the part of the plaintiff, "That after the penalty had been so re-"
covered against the servant, the *servant himself* was totally "
at liberty to go into what service he pleased," And so also was the *master* at liberty and quite freed from the articles, with respect to the servant: for, there was a total end of the contract, as between *them two*.

Then how will the case stand as to the *seducer*? It is *actual* injury done to the master, that gives him the action against the seducer: a bare *attempt* to seduce, without any damage following upon it, would not be an injury to the master; and, consequently, would be no ground upon which he could maintain an action.

Here is *no injury at all* done to the master: for, he has recovered and received a *complete* satisfaction and *MORE*. Therefore all the injury is done away, and is as if it never existed.

A PENALTY, in the very term, includes *more* than the real damages actually suffered. And if the seducer or second master, who employs the servant after the servant has paid the penalty, were to be liable to damages in an action brought by the first master for so doing, this would finally *fall upon the servant*, and in effect be an *ADDITION* to the penalty: for, the second master will pay the servant for his service

no more than he estimates it to be worth to *him*: and if he must pay a sum of money (20*l.* for instance) to the first master, for damages for entertaining his servant, he will make his bargain with the servant in *such* manner as to pay him so much the *less*.

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Therefore there is no colour for the plaintiff to maintain his action upon this *first* point, *viz.* upon supposition of his having *actually received the penalty* of the servant, *before* the commencement of his action against the second master, as the seducer of his servant.

2d. Point—But taking it, as this case was, “That he *had not* actually received it of the servant till *after* the *commencement* of the present action;” let us see whether this circumstance will vary the case.

Several arguments were drawn by the counsel for the defendant, from cases of joint-trespassers and joint-contracts; which were urged as being applicable to the present question. But they were sufficiently answered by Mr. Solicitor-General.

There, the recovery is against them all, for the *same* thing: and there is no analogy, at all, between those cases and this. In those cases, there is a recovery of the self-same thing, for a joint injury: the defendants are all of them liable to the plaintiff, and he may proceed against *any*, or *all* of them if he pleases; as it is but *one* trespass, *one* contract, and *all* are liable. Yet he shall have *but one satisfaction* from them all.

Another essential difference between those cases upon torts and actions upon the case, is, that those are actions *stricti juris*; and therefore such a former recovery, release or satisfaction can not be given in evidence, but must be *pleaded*: but an action upon the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and, in effect, is so; and therefore such a former recovery, release or satisfaction need not be pleaded, but may be *given in evidence*. For whatever will, in equity and conscience according to the circumstances of the case, bar the plaintiff's recovery, may, in *this* action, be given in evidence by the defendant; because the plaintiff must recover upon the *justice and conscience of his case*, and upon *that only*.

Whether he could have recovered in an action commenced against the present defendant, *after* having recovered the *penalty* from the servant, but *WITHOUT* having *actually received* the

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the money so recovered from the servant, I will not now determine: I should have doubted of it, extremely.

But *here*, the penalty recovered by him from the servant was *actually received* by him *before* the present action came on to be TRIED; *without* any sort of difficulty. He *might* have received it, when he would: but he *chooses to lie by*, till he has brought his action against a third person, who would *not* have been liable to any thing, *if* the plaintiff had received the money of the servant in due time; and *then receives* it of the first defendant, and *afterwards proceeds* in *this* action to recover it against the second defendant; which is *against conscience*. Therefore in *such* an action as *this* is, (an action of equity, not a formed action *stricti juris*;) it is enough if it appears *upon the evidence* that the plaintiff ought not in conscience to recover it.

If he had *actually recovered* it, through the defendant's not knowing "That the penalty had been paid," an action would lie against him, for *money had and received*: like the * case out of the court of *conscience*, not long since determined in this court.

* V. Moses v. Macfarlan, 19th May 1760; V. ante, p. 1005.

As the plaintiff has *already received*, from the servant, MORE than *ample satisfaction* for the injury done him, he can not *afterwards proceed* against *any other* person for a *further* satisfaction.

And my brother Denison suggests to me, that the court would, upon the application of the present defendant, *by way of motion*, have stayed the plaintiff's *proceeding further* against him, upon the defendant's shewing them "That the plaintiff *had actually received* the money recovered by him in his *former action* against the servant."

Per Cur.'

Let the *posse* be delivered to the DEFENDANT.

Price *versus* Neal.

THIS was a special case reserved at the sittings at Guildhall after Trinity term 1762, before Lord Mansfield.

It was an action upon the case brought by Price against Neal; wherein Price declares that the defendant Edward Neal was indebted to him in 80*l.* for money had and received

to

(1 Black. Rep. 390. S. C.)
The same 16th Nov. 1762.

Forged bill of exchange accepted and paid by drawee, he cannot recover the money back from the indorsee, to whom the drawee paid it.

to his the plaintiff's use: and damages were laid to 100*l.* The general issue was pleaded; and issue joined thereon.

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NEAL.

It was proved at the trial, that a bill was drawn as follows—
 “ *Leicester*, 22d November 1760. Sir, six weeks after date
 “ pay Mr. Rogers Ruding or order forty pounds, value re-
 “ ceived for Mr. Thomas Poughfor; as advised by, Sir, your
 “ humble servant Benjamin Sutton. To Mr. John Price in
 “ *Busb-lane, Cannon-street, London*; indorsed “ R. Ruding,
 “ Antony Topham, Hammond and Laroche. Received the
 “ contents, James Watson and son: witness Edward Neal.”

That this bill was indorsed to the defendant for a VALUABLE CONSIDERATION; and notice of the bill left at the plaintiff's house, on the day it became due. Whereupon the plaintiff sent his servant to call on the defendant, to pay him the said sum of 40*l.* and take up the said bill: which was done accordingly.

That another bill was drawn as follows—“ *Leicester*, 1st, February 1761. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Poughfor; as advised by, Sir, your humble servant Benjamin Sutton. To Mr. John Price in *Busb-lane, Cannon-street, London*.” That this bill was indorsed, “ R. Ruding, Thomas Watson and son. Witness for Smith, Right and Co.” That the plaintiff accepted this bill, by writing on it, “ accepted John Price:” and that the plaintiff wrote on the back of it.—“ *Messieurs Freame and Barclay*, pray pay forty pounds for John Price.”

That this bill being so accepted was indorsed to the defendant for a VALUABLE consideration, and left at his bankers for payment; and was paid by order of the plaintiff, and taken up.

Both these bills were FORGED by one Lee, who has been since hanged for forgery.

The defendant Neal acted INNOCENTLY and BONA FIDE, without the least privity or suspicion of the said forgeries or of either of them; and paid the WHOLE value of those bills.

The jury found a verdict for the plaintiff; and assessed damages 80*l.* and costs 40*s.* subject to the opinion of the court upon this question—

“ Whether the plaintiff, under the circumstances of this case, can recover back, from the defendant, the money he paid on the said bills, or either of them.”

Mr.

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NEAL.

Mr. *Storwe*, for the plaintiff, argued that he ought to recover back the money, in this action; as it was paid by him by MISTAKE only, on supposition "That these were true genuine bills;" and as he could never recover it against the drawer, because in fact no drawer exists; nor against the forger, because he is hanged.

He owned that in a case at *Guild-hall*, of *Jenys v. Fawler et al'*. (an action by an indorsee of a bill of exchange brought against the acceptor,) Lord *Raymond* would not admit the defendants to prove it a forged bill, by calling persons acquainted with the hand of the drawer, to swear "That they believed it not to be so:" and he even strongly inclined, "That actual proof of forgery would not excuse the defendants against their own acceptance, which had given the bill a credit to the indorsee."

But he urged, that in the case now before the court, the forgery of the bill does not rest in belief and opinion only; but has been actually proved, and the forger executed for it.

Thus it stands even upon the accepted bill. But the plaintiff's case is much stronger upon the other bill which was not accepted. It is not stated, "That that bill was accepted before it was negotiated:" on the contrary, the consideration for it was paid by the defendant, before the plaintiff had seen it. So that the defendant took it upon the credit of the indorsers, not upon the credit of the plaintiff: and therefore the reason, upon which Lord *Raymond* grounds his inclination to be of opinion "That actual proof of forgery would be no excuse," will not hold here.

Mr. *Vates*, for the defendant, argued that the plaintiff was not intitled to recover back this money from the defendant.

He denied it to be a payment by mistake; and insisted that it was rather owing to the negligence of the plaintiff; who should have inquired and satisfied himself "Whether the bill was really drawn upon him by *Sutton*, or not." Here is no fraud in the defendant; who is stated "To have acted innocently and bona fide, without the least privity or suspicion of the forgery; and to have paid the whole value for the bills."

Lord MANSFIELD stopt him from going on; saying that this was one of those cases that could never be made plainer by argument.

It

It is an action upon the case, for money had and received to the plaintiff's use. In *which* action, the plaintiff can not recover the money, unless it be *against conscience* in the defendant, to *retain* it: and great *liberality* is always allowed, in *this sort* of action.

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NEAL.

But it can never be thought *unconscientious* in the defendant, to *retain* this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had *bona fide* paid, without the least priority or *suspicion* of any forgery.

Here was *no fraud*; no *wrang*. It was incumbent upon the plaintiff, to be satisfied, "That the bill drawn upon him *was the drawer's hand*," before he accepted or paid it: but it was *not* incumbent upon the defendant, to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him: and he sends his servant to pay it and take it up. The other bill, he actually *accepts*: after which acceptance, the defendant *innocently* and *bona fide* discounts it. The plaintiff lies by, for a considerable time after he has paid these bills; and *then* found out "That they were forged:" and the forger comes to be hanged. He made no objection to them, at the *time* of paying them. Whatever neglect there was, was on *his side*. The defendant had actual encouragement from the plaintiff himself, for negotiating the *second* bill, from the plaintiff's having without any scruple or hesitation *paid* the first: and he paid the whole value, *bona fide*. It is a misfortune which has happened without the *defendant's* fault or neglect. If there was *no* neglect in the plaintiff, yet there is no reason to throw off the loss from *one innocent* man upon *another innocent* man: but, in this case, if there was *any* fault or negligence in any one, it certainly was in the *plaintiff*, and *not* in the *defendant*.

Per Cur'.

RULE—That the *posse* be delivered to the DEFENDANT.

Trott, *qui tam*, &c. *versus* Welch.

THIS was an action of debt, brought by a custom-house officer, upon an act of parliament of 26 G. 2.

action to one month in stat. 26 G. 2. c. 21. for prohibited goods; must be after condemnation, provided due diligence be made.

(1 Black. Rep.
392. S. C.)Tuesday 23
Nov. 1762.Limitation of
condemnation,

c. 21.

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TROTTER v.
WELCH.

c. 21. for a penalty of 200*l.* for having wrought silks found in his possession, unsealed.

This act of parliament was made for encouraging the silk-manufacture of this kingdom, and for securing the duties upon velvets, wrought silks &c. The first section directs all velvets, wrought silks &c. to be *sealed*. The third section enacts, that if any be found *unsealed*, they shall be *forfeited*, and may be *seized* by any officer of the customs; and shall, *after condemnation*, be publicly sold to the best bidder; and one moiety of the produce shall be to the use of his majesty, and the other moiety to the officer who shall seize the same: and the *person in whose possession* the goods so seized are found, shall for every such offence *forfeit* 200*l.* The sixth section directs, that all *pecuniary penalties* imposed by this act, shall be *sued for*, in any court of record at *Westminster*, or in the court of *Exchequer* at *Edinburgh*, respectively, by action &c, in the name of his majesty's attorney general, or of his majesty's advocate in *Scotland*, or in the name of *some officer of the customs*: and one moiety of every such penalty shall be to his majesty, and the other moiety to the *officer of the customs* who shall inform and prosecute. Then comes a *PROVISO*, in the seventh section, "That if any officer of the customs shall *neglect or refuse*, for the space of *one month*, to PROSECUTE TO EFFECT any person or persons, for any *pecuniary penalty* or *forfeiture* by this act inflicted upon offenders against the same, then it shall be lawful for any person or persons whomsoever to sue for, prosecute, and recover the respective *pecuniary penalties* and *forfeitures* by this act inflicted, in like manner as is therein before directed with regard to the officers of the customs: and one moiety of the said respective *forfeitures*, when recovered, shall, in such case, go and be applied to the use of his majesty his heirs and successors; and the other moiety, to the person or persons who shall sue or prosecute for the same respectively."

The defendant in the present action *pleaded* a *RECOVERY* of the *same* penalty, in a *former action* brought against him for it, by *another person*; and *payment* of it to that *other person* pursuant to the said recovery: and he sets forth the particulars of the said recovery. He also stated, in his plea, the act of parliament abovementioned; and alleges "That the custom-house officer did not bring his action within a month *after the SEIZURE*:" whereupon, the other person brought his action, and recovered, as aforesaid.

The plaintiff in the present action *replies* (*protestando* that the judgment pleaded by the defendant was obtained by fraud,)

"That

“ That he, the now plaintiff, *did*, within one month *after* the CONDEMNATION of the goods seized, bring his action against the defendant, and prosecuted it to effect:” and he alleges, that the *seizure* was made on the 2d of *May*; that his information in the *exchequer* was filed on the 22d of *May*; and that the *condemnation* was on the 3d of *November*.

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TROT V.
WELCH.

To this replication the defendant demurred: and the plaintiff joined in demurrer.

Mr. *Walker*, for the defendant, argued that the custom-house officer ought to have brought his action within the space of one month from the SEIZURE of the goods. The prosecution for the *pecuniary* penalty is *not* tied up to the time of the *condemnation*: the limitation refers to the time of the *seizure*.

Mr. *Yates*, *contra*, for the plaintiff, argued that the meaning of the act of parliament is, “ That if the custom-house officer shall neglect or refuse, for a month after the condemnation, it may then be lawful for any other person to do it.” He has attached the interest in himself, *by exhibiting the information*. He can’t be said to have neglected or refused to prosecute to effect: for, he has *seized* the goods; he has proceeded *in rem*, (which attaches the right of action in him;) and he now prosecutes for the *penalty*.

THE COURT were clearly and unanimously of opinion with Mr. *Yates*. They held that the custom-house officer had *used due diligence*; and that the right of action attached in him, by his *seizure*, exhibiting an information, and *proceeding to condemnation*: and accordingly they gave an † unanimous JUDGMENT for the PLAINTIFF.

† Mr. J. Foster was not present.

Rex versus Heydon.

(1 Black. Rep. 351, 404. S. C.)

THE defendant stood convicted of * *bribery* at an election for members to *Parliament*.

Wednesday,
24 Nov. 1762.

* V. ante,
p. 1270, 1304.

And because the time limited for bringing the *qui tam* action will expire in *March* next, the matter was *adjourned* till the first day of next *Easter* term: and *Heydon* entered into his *own* recognizance *only*, in one hundred pounds, (which was not at all opposed by the prosecutor’s counsel,) to appear here again at that time.

In bribery at the election of members to serve in parliament, passing sentence adjourned from one term to another, because the time for suing expired in the intermediate month of March.

This was S. P. with *Rex v. Pitt*, and *Rex v. Mead*, ante pa. 1335. V. post pa. 22d April 1763.

Hunt

1762.

Hunt *versus* Coxe.(1 Black. Rep.
393. S. C.)Thursday, 25
Nov. 1762.Sci. fa. against
bail, may be
sued out after a
Ca. Sa. return-
ed, though not
regularly filed,
and short notice
to the bail is
immaterial.

THE COURT unanimously agreed, that it was right and necessary to adhere strictly to the established rules of the court relating to the time and manner of *bail's surrendering their principal*.

The two points chiefly disputed in the present case, were the *filing* the return of the *Ca. Sa.* against the principal; and the actual surrender of the principal *within* the limited time.

THE COURT considered the *Ca. Sa.* against the principal as little more than matter of form; and chiefly intended to intimate to the bail, in *what species of execution* the plaintiff determined to proceed: and as the *leaving* it in the sheriff's office was a notice to the bail, "That the plaintiff would proceed against the *person* of the defendant," it was incumbent upon the bail to *search* "Whether any *Ca. Sa.* was left in the office;" and that the court would not enter into an examination by affidavit, "Whether the *Ca. Sa.* was actually returned, or such return actually filed, BEFORE the issuing of the *scire facias* against the bail;" and the rather, because if the bail had *pleaded* to the *scire facias*, "That no *Ca. Sa.* was returned and filed *before* the teste of the *scire facias*, such return might have been filed at ANY time before putting in a replication to such plea."

As to the *time and manner of SURRENDERING*—they held that a surrender at about half an hour after eleven at night on the last day, (which was the last day of the term,) *without* an actual bringing the defendant into court, (which was then risen,) or before a judge (none being accessible at that late hour,) in order to have an *exoneretur* entered upon the bail-piece, was *not* sufficient; though it was so late at night as to render the doing this impracticable; and though the defendant was actually delivered to a judge's tip-staff, and even lodged in the *king's bench* prison, that very night; which the bail swore was the utmost that *the very late notice* they received from the sheriff of the *Ca. Sa.* (which was returned "*scire facias*") gave opportunity to them to do.

Their RULE to shew cause why the proceedings against them should not be stayed, and an *exoneretur* entered on the bail-piece &c. was DISCHARGED with

costs:

costs: for, the court would not meddle with the sufficiency of the time for surrendering the principal; because a *scire feci* had been *duly returned* by the proper officer.

1762.

HUNT v. COXS.

Wilson *versus* Duckett.Saturday, 27,
Nov. 1762.

THIS was an action upon a policy of insurance on a ship; with a count of a general *indebitatus assumpsit* for money had and received to the plaintiff's use: and damages were laid at 98*l*.

What part of a premium must be returned, if a policy of insurance be given up and cancelled, discussed, but not determined.

The trial was had under a decree of the court of chancery, where the now defendant, the insurer, being there complainant, had *offered* to pay back the premium, which was 10*l*.

No money was, in the present case, *paid into court*; though the usual course in these cases is for the defendant, the insurer, to bring the premium into court.

The jury found a verdict for the *plaintiff*, for the ten pounds PREMIUM, on the count for money had and received to his use; although they were of opinion against the *policy*, upon the foot of *fraud*; and found against it, as being *fraudulent*. (In fact, the first under-writer was only a decoy-duck, to induce other persons to underwrite the policy: and it had been previously agreed between the insured and him, "That *he should not be bound* by his signing the policy;" which this court considered as a *fraud*, and therefore that the jury had given a *right* verdict in finding the policy *fraudulent*.)

By concurrence of Lord *Mansfield*, (before whom it was tried,) and of the counsel on both sides, it was agreed to bring this question before the court, "Whether, upon a " policy of insurance being found *fraudulent*, the PREMIUM " should be *returned* to the plaintiff the insured, or *retained* " by the defendant the insurer."

The method taken was by the defendant's counsel moving (on *Monday* the 22d instant) for a rule to shew cause why the judgment should not be entered up for the *defendant*; and the court's making a rule to shew cause.

Mr. *Harvey*, for the plaintiff, now shewed cause. He argued that this contract was to be looked upon as VOID AB INITIO. Therefore *no risque* was run by the defendant; and consequently, he had no right to retain the premium.

There

1762.

WILSON

v.

DUCKET.

* V. Precedents in chancery 20. where

a fraudulent policy was decreed to be delivered up; and the premium to be repaid; the plaintiffs deducting thereout their costs. † The like decree—policy to be delivered up, with costs; but the premium to be paid back, and allowed out of the costs.

There is no case at *common law*, on this head, that has been judicially determined. But in cases like this, equity and common law courts have concurrent jurisdiction; and must determine alike, upon like circumstances: and the two cases in equity, of * *Wittingham v. Thornborough*, and † *De Costa v. Scandret* are nearly in point.

Mr. Morton and Mr. Yates, for the defendant, mentioned a case of *Rucker v. Hollingbury* before the master of the rolls; who was of opinion contrary to Mr. Harvey's two cases.

But Lord MANSFIELD said that there must be some mistake, in reciting this last case before the master of the rolls: for, the *practice* of the court of CHANCERY is certainly agreeable to Mr. Harvey's cases. But what he wanted to know was, "Whether there was any *COMMON-law* determination to the same effect?" [Which it did not appear that there was.]

Whereupon Lord MANSFIELD said, it was plain what must be done in *this* case: for, he looked upon the offer made by the complainant's bill in equity, to be the *same* thing as if the money had been *ACTUALLY brought into court*, in the present case.

Therefore a rule was made, that the verdict found for the plaintiff be *vacated*; and that a verdict be entered for the DEFENDANT.

Monday 29th
Nov. 1762.

Where it appeared that the person confined was a lunatic, and not fit to be produced in court, and that the relations were applying for a commission of lunacy, the court therefore enlarged the time for making a return to an *hab. corp.* directed to the keeper of a private mad-house.

Rex versus William Clarke.

AN *habeas corpus* having issued, on Friday last, directed to Mr. Clarke who was the keeper of a private mad-house at Clapton, commanding him to bring up the body of Mrs. Anne Hunt, who was kept confined in his house;

Mr. Solicitor General now moved to return the writ; at the same time offering an affidavit from Dr. Monro, importing "That about nine months ago he was applied to, by Mrs. Threlkeld, Mrs. Hunt's daughter, for his advice and assistance concerning Mrs. Hunt, as a person disordered in her senses; and that thereupon he recommended her to

the

" the care of the said *William Clarke*, who keeps a private mad-house, and is accustomed to have the care of such unfortunate persons; and that she is still in the custody of the said *William Clarke*, upon the same occasion;" and he further swears " That from the time of her being so placed under the care of the said *William Clarke*, to this time, the said *Anne Hunt* hath appeared and is yet, in his judgment, a LUNATIC; and is now in so disordered a state of mind, that she is NOT FIT to be brought into this court." The affidavit adds, " That he is informed and verily believes that a COMMISSION OF LUNACY will shortly be issued against the said *Anne Hunt*; and that the same hath been deferred on no other account but because of the late minority of *Anne Bowen*, the grand-daughter and one of the next akin of the said *Anne Hunt*; which said *Anne Bowen* is now come of age, as the doctor hath been informed and believes."

1762.

REX V.
W. CLARKE.

But Lord MANSFIELD proposed to put this matter into another method; viz. to use this affidavit of Dr. Monro's as a reason for enlarging the time to return the writ, instead of actually filing the return at present.

Accordingly, Mr. Solicitor took back the writ and return; and

THE COURT enlarged the time for making the return till the next term, being perfectly well satisfied by the affidavit of Dr. Monro, that Mrs. Hunt was not in a condition fit to be taken out of the care and custody of those to whom her person was intrusted, and who were upon the point of obtaining a proper legal authority for what they were doing; which, however intended for her benefit and advantage, had not yet obtained that strict legal sanction which they were now in a regular pursuit of.

Mr. Serjeant Whitaker, who had moved for the *habeas corpus*, came afterwards into court, and desired a rule for liberty to have access to and inspection of Mrs. Hunt, in order to see that she was properly treated. But as he could not make out, that his application was made on behalf of any person who had the least pretension to demand this, the court rejected his request.

Fisher versus Prince.

UPON shewing cause by the plaintiff's counsel, " Why, upon DELIVERING to the plaintiff the several goods

Specific thing demanded in trover may, in some cases, be

brought into court, or delivered to plaintiff, and costs paid to time of motion.

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" and

1762.

HARDING v.
WILKIN.• Harding v.
Wilkin, H.
27 G. 2. B. R.

"and chattels for which this action (which was an action of TROVER) was brought, and paying him his costs to the day of making the motion, further proceedings should not be stayed;" (which rule to shew cause had been obtained upon a motion made by the counsel for the defendant;) it was urged on the part of the plaintiff, that this is, in effect, a motion "To bring the goods into court;" and it was contrary to the course of the court, in actions of TROVER, to bring into court the thing demanded, (excepting the single case of trover for monies numbered;) and that the reason which has been often given for it is, "That this court do not keep a warehouse;" and a case was hinted at, where a motion to bring in a gold watch was denied.

And the court denied it in the present case, and discharged the rule: but it was *not* upon that general principle that they denied it, but upon the *circumstances of the case*; such as the complicated quantity of the goods demanded, and the uncertainty of their remaining of the same value as they were when taken; and some other like circumstances. For

Lord MANSFIELD and Mr. Justice WILMOT both concurred in the following distinction, "That where trover is brought for a *specific chattel*, of an *ascertained* quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, but that it's *real and ascertained value* must be the *sole measure* of the damages, there the specific thing demanded *MAY* be brought into court; (and Mr. Justice Wilmot said, this was the more reasonable, as this action of trover comes in the place of the old action of detinue :) where there is an *uncertainty* either as to the quantity or quality of the thing demanded, or that there is any tort accompanying it that may enhance the damages *above* the real value of the thing, and there is no rule whereby to *estimate* the additional value, there it shall *not* be brought in." Lord Mansfield said, it is pity that a false conceit should, in judicature, be repeated as an *argument*: "The court does not keep a warehouse," What then? What has a warehouse to do with ordering the thing to be *delivered* to the plaintiff? Money paid into court is payment to the plaintiff. The *reason* and *spirit* of cases make law; not the *letter* of particular precedents. In trover for money numbered, or in a bagg, the court have ordered it to be brought in: yet the jury may give more in damages; they may allow interest, (and in some cases they ought.)

The

The *reason* holds to every *other* case, where a thing clearly remains of the *same value*: yet the jury may give damages for the *detention*.

1762.

FISHER v. PAIRCE.

I remember its being done twice or thrice, in things of small value. It ought to be done, to prevent vexatious litigation; which a plaintiff may be tempted to pursue, when in all events he is sure of costs. It ought to be done, because it is the *specific relief*.

It ought to be done; because at the trial, when the thing remains in the same condition, there generally is a rule "To deliver it."

An *estimated* value is a precarious measure of justice, compared with the *specific thing*.

I am aware of the cases where a *laced head*, a *gold watch*, a *diamond ring*, and *Chinese pictures* were refused to be brought in.

But, as I think "Such motions ought neither to be refused or granted, *of course*," they must depend upon their own *circumstances*. No injury is done the plaintiff, if the court should think "He ought not to proceed for damages beyond the *specific thing*;" because he may *still* proceed for more, at the *peril of costs*: and so he ought.

But, in *this* particular case, the goods are *altered*, and their *value changed*.

Rex versus Whitear et al'.

MR. Serjeant Stanniford and Mr. Yates shewed cause why an order of sessions should not be quashed. It was an order *originally* made at the *quarter-sessions* for the borough of *Portsmouth*; and purported to be an order made upon the appeal of the present overseers of the poor of the parish of *Portsmouth*, directing their predecessors the *late* overseers to pay over to the appellants, the *present* overseers, the balance of their accounts; which accounts were settled and balanced by the said order of sessions.

Quarter sessions have no jurisdiction to make an original order for late overseers of the poor to pay monies to successors.

1762.

Rex v.
Whitaker
& al.

To this order, four exceptions had been taken; the first of which was a material one: the three others were slight, and not necessary to be here specified, because the court quashed the order upon the *first* objection, without taking any notice of the *rest*.

The first exception was to the JURISDICTION of the SESSIONS, to make an order upon late overseers to pay over monies to their successors, by way of *original* order, in the *first* instance; WITHOUT any *previous* application having been made to *two justices*, pursuant to the directions of 43 Eliz. c. 2.*

* V. § 4. and
§ 6.

It was urged in support of this exception, that all subordinate jurisdictions must shew "That they *have jurisdiction* of "the matter they take upon them to determine." But here has been *no previous application* to two justices, or any *appeal* to the sessions from any former order: and the sessions can not take it up *per saltum*, nor have they any *original* jurisdiction. Therefore their jurisdiction fails.

All this was, fully and on mature deliberation, determined in the case of *Rex v. Bartlett et al.* Church-wardens and overseers of *Brackley St. Peters, Tr. 7, 8 G. 2. B. R.* † 2 *Strange* 983.

† N. E. Sis
J. S. gives

only a short account of it, in a few lines: but it was argued and discussed several times, both at the bar and by the bench.

The answer given to this objection by the Serjeant and Mr. Yates, was, That the present order was not made upon the statute of 43 Eliz. (as that of *Rex v. Bartlett* was;) but upon 17 G. 2. c. 38. § 4. which gives an appeal to the next general or quarter sessions of the peace, to "Any person or persons who shall find him, her or themselves aggrieved by any rate or assessment made for the relief of the poor, or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein; or shall have any material objection to such account as † *aforsaid*, or any part thereof; or shall find him, her or themselves aggrieved by ANY NEGLIGENCE, act or thing done OR OMITTED by the church-wardens and overseers of the poor, or by any of his majesty's justices of the peace."

† Which is the
account of the
churchwardens
and overseers.

The reply made by Mr. Solicitor General (who had taken this exception) was, that the statute of 17 G. 2. c. 38. does
not

Hilary Term.

3 Geo. 3. B. R. 1763.

One case only
worthy report,
determined this
term.

MEMORANDUM—There was but one single case determined within this term, that seemed worthy of being reported: though some few cases were under the consideration of the Court, which afterwards received their determination, and will follow in their course; particularly, the cases of *Bidlefon v. Whytel*, and *Glaver v. Black*.

(1 Black. Rep.
400. S. C.)
Saturday, 12
Feb. 1763.

Bankrupt exe-
cutor pleading
false plea, after
commission,
liable to costs.

Howard, Widow, and Another, Executors,
versus Jemmet, Executor,

ON shewing cause against setting aside a *fiery facias*, and paying back to the defendant the monies levied thereon, it appeared that the defendant was a **BANKRUPT**, against whom a commission had issued, and who had afterwards obtained his **CERTIFICATE**; and that the present action was brought against him *as executor*, upon a bond entered into by the defendant's testator; and the defendant had, between the time of the issuing of the commission and the time of obtaining his certificate, pleaded a **FALSE PLEA** (*viz.* "That he had no assets," where in fact he had some assets in his hands,) which was found against him; and thereupon the plaintiffs had judgment *de bonis testatoris si &c.* and against the defendant himself, *de bonis propriis, for the costs*.

Mr. Solicitor General, on behalf of the defendant, urged, that by virtue of the bankrupt act of 5 G. 2. c. 30. The defendant was *not liable* to the execution as to his *own proper* goods; because he had given up his *all* under the commission of bankruptcy, and stood **DISCHARGED** by the certificate against

all demands which might have been made upon his estate and effects under the commission: and he alledged, that these costs having arisen from the necessity he was under of staying off the judgment, they were such a debt as might have been proved under the commission.

1763.

HOWARD and
Another v.
JEMMETT.

But *per Cur'*—The pleading a false plea was his own act, and his own fault: and the judgment and execution *de bonis propriis*, for costs, was singly owing to this his false plea; which was subsequent to the issuing of the commission. Consequently, it could not have been proved under the commission; and therefore can not be discharged by the certificate,

RULE DISCHARGED.

V. 2 Sir J. S. 1197. *Graham v. Benton.*

Note—

Per Lord MANSFIELD—If an executor becomes bankrupt, the commissioners can not seize the specific effects of his testator; not even in money which specifically can be distinguished, and ascertained to belong to such testator, and not to the bankrupt himself.

The End of Hilary Term 1763. 3 G. 3.

Easter Term,

3 Geo. 3. B. R. 1763.

Bonafous *versus* Rybot.

Wednesday,
20 April 1763.

Principal and
interest due on
bonds condition-
ed for payment
of monies by
instalments,
may be paid in-
to court.

MR. Eliab Harvey and Mr. Thurlow, on the part of the plaintiff shewed cause against a rule which had been obtained by the defendant in this action (which was debt on bond,) for the plaintiff to shew cause why it should not be referred to Mr. Owens, to compute what is due to the plaintiff, of the several INSTALMENTS stipulated by articles of agreement bearing date on or about the 26th day of January 1758, and made in *defeazance* of the bond whereupon this action is brought; and why upon payment of what shall appear to be due, with interest for the INSTALMENT unpaid, together with the plaintiffs costs to be taxed by Mr. Owens; all further proceedings in this action should not be stayed.

This rule was obtained upon the act of parliament of 4, 5 Ann. c. 16. § 13. whereby it is enacted, "That if at any time pending an action upon any * such bond with a penalty, the defendant shall bring into the court where the action shall be depending, ALL the principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond; the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond; and the court shall and may give judgment to discharge every such defendant of and from the same accordingly."

The fact of the present case was, that the bond upon which this action was brought was a bond conditioned for payment of a gross sum of money absolutely at a day certain (in April 1759:) but no mention was therein made of paying the money by instalments;

* This word "such" refers to the preceding clause, which mentions "any bond which hath a condition or defeazance to make void the same upon payment of a lesser sum at a day or place certain."

instalments; nor was, that any part of the original agreement; which original agreement is dated the 13th of January 1758. But

1763.

BONAPARTY.
KTS.

Afterwards on the 26th of January 1758, the parties came to a subsequent agreement, and entered into articles dated on that day; by which articles it is agreed between the said plaintiff and defendant, "That the money shall be paid by "INSTALMENTS;" four of which instalments were fixed to Midsummer 1759, Midsummer 1760, Midsummer 1761, and Midsummer 1762; and the last, at Midsummer 1769.

In these articles is contained a DEFEASANCE to the bond of 13th January 1758, in case the sum mentioned in the condition thereof to be payable in gross at the certain day therein fixed, should be paid by INSTALMENTS upon the particular days specified in this defeazance: PROVIDED that the said sums agreed to be taken by instalments should be punctually and regularly paid by the defendant at and upon the very days specified in the defeazance for making the respective payments; and that the defendant should live till all the said days be past. Otherwise, this defeazance was to be VOID.

The defendant paid the two first payments at Midsummer 1759 and 1760, and part of the instalment due at Midsummer 1761; but totally neglected to pay that which became due at Midsummer 1762, or even any part of it. At Michaelmas 1762, (subsequent to the last mentioned instalment) the defendant paid to the plaintiff, and the plaintiff received of him the whole interest then due upon the whole debt up to that time; including INTEREST for the sum payable at the preceding Midsummer, as well as for all the remaining money not yet become payable.

The plaintiff's counsel urged, in discharge of this rule—

1st. That the case of a bond conditioned for payment of money BY INSTALMENTS is not within this act of parliament. For, it is confined to common and ordinary bonds conditioned for payment of a lesser sum at a day certain; and does not extend to such as are conditioned or defeazanced upon payment of the money by instalments: at least, not till after all the days of payment are past: as is manifest by the direction "That the money brought in shall be taken to be in full satisfaction of the bond, and that the court shall give judgment "to DISCHARGE the defendant from the same:" which would destroy all the plaintiff's security for the subsequent payments not yet become payable: And they said, that they could find *no

* V. 2 Stra.
814.

case

1763.

DONALDSON V.
KIBBOT.

case where it had been holden to extend to bonds conditioned for paying the money by instalments.

2dly. That even admitting that a bond conditioned for paying money by instalments, or so defeazanced at the time of executing the bond, might be construed to be within the intention of the statute; yet it would by no means follow, that a case circumstanced as the present case is, would be within it likewise: for, here the defeazance, was not made nor thought of at the time when the bond was executed; but is a distinct subsequent transaction, at a future time, and in a distinct deed or instrument executed long after the bond.

3dly. That the court could not enter into this matter, without taking upon themselves to try a cause in equity, upon affidavit only, without bill, answer, interrogatory, or examination of witnesses; and to give an equitable relief to the defendant upon his own affidavit only, against a legal right actually vested in the plaintiff: for, the defeazance, which was in favor of the debtor, not being complied with, is become totally void, by the proviso contained in it; and the bond and penalty stand in full force at law; and the defendant has no claim to be relieved against the forfeiture; especially, considering the value of money at the times when the plaintiff ought to have received it. The defeazance being void, by the express terms of the proviso; all the agreements contained in it, relating to the paying the money by instalments, are quite out of the present case, as much as if no such defeazance had ever existed.

4thly. They asserted that if the court were at liberty to enter into the equitable circumstances of the case, they would appear to be strongly on their client the plaintiff's side.

Sir Fletcher Norton, Solicitor-General, and Mr. Yates, contra, for the defendant, maintained the contrary; and argued thus, in support of the rule;

1st. A bond conditioned or defeazanced for payment of the money by instalments is, after any of the days are past, within the intention and purview of this act: and they said that there have been cases so determined; but did not specify any in particular.

2dly. It's being upon a separate paper can make no difference, upon the equity of the statute: no more can it's being subsequent to the execution of the bond.

3dly.

3dly. The plaintiff has *voided* the forfeiture, by receiving interest not only for the sums due at Midsummer 1761, and Midsummer 1762, but even quite up to the FOLLOWING Michaelmas,

1763.
DONARD V.
ATTON

4thly. The equitable circumstances of this case they alledged to be quite with the defendant, instead of being strongly on the side of the plaintiff.

Mr. Justice DENISON thought the case to be within the act; or, at least, that the proviso in the defeazance makes no difference: for, that proviso "That the defeazance should be void on failure of any of the payments by instalment," imports nothing more than what would have been implied though it had not been inserted.

But Lord MANSFIELD said, that this proviso in the defeazance makes the whole money due upon failure of any of the payments by instalment: and it seemed to him, that the whole turned upon this.

This act of parliament reforms in some instances, an erroneous course of proceeding in the courts of law and equity; which ought never to have prevailed; and which the courts themselves might and ought to have remedied, but did not. Therefore it should not only have the most liberal construction; but the courts ought to exercise their own authority, to extend the spirit and reason of this parliamentary interposition, "For the easier speedier and better advancement of justice" to cases not mentioned in the act. So Lord Hardwicke did. When a cause was set down to be heard upon a bill and answer, and the bill dismissed; the plaintiff, by the course of the court, only paid forty shillings costs. The act provides for the case of the plaintiff's dismissing his own bill, or its being dismissed for want of prosecution; but does not mention the case of dismissal on bearing: so that the plaintiff, by putting the defendant to more expence and vexation, avoided making reparation. This course continued in chancery till late in Lord Hardwicke's time; when he made an order to alter it.

It is surprising, that after the statute of usury, 37 H. 8. which excepts obligations with condition, made upon a just and true intent, the courts of law did not consider the just intent of a bond to be principal, interest and costs, secured by a penalty; and suffer the party at any time, to save the forfeiture by performing the intent.

1763.

BONAPARTE v.
RYBOT.

It is more extraordinary, that *after* this was settled in a court of equity "To be the nature of a bond," and therefore every party to a bond *understood* it in *this* sense; the courts of law did not follow equity, but still continued to do *injustice*, as of course; and put the parties to the delay and expence of setting it right *elsewhere*, as of course.

The act of parliament meant, that in cases of penalties by way of *security*, the clear final justice of the case should be attained in the courts of *law*: (much to the benefit of both parties.)

I cannot see a doubt, upon *bonds conditioned* for payment of money by *instalments*: and I am glad to hear that it has been so determined.*

* See 2 Stra.
814. Bridges v.

Williamson, 2 G. 2. and in *Malne v. Somner*, Hil. 1730, 4 G. 2. in this court, in a like case, where the first day only past. It was moved by Mr. Pillsworth, and opposed by Mr. Filmer: and the court, after some hesitation, *granted* it.

The defeazance being dated at a *subsequent time*, and written on a distinct and *separate paper* from the bond, makes no difference.

But what makes the difference, is this: The bond here is conditioned for payment of a *gross sum*, then due, to be paid at a certain *fixed day*. Then there is a subsequent agreement made in favor of the debtor, easing him of that stipulated single payment *at that fixed day*, and allowing him to pay it by *instalments*; PROVIDED that he pay it *punctually* on the days agreed upon; and that he live till they shall be all past: otherwise this agreement and defeazance to be void. And consequently, as the debtor has *not* paid the money *punctually*, they are void, and the *gross sum* is due to the obligee.

There is a distinction in the court of chancery, "That if 5 per cent. be reserved for interest on a mortgage, with a condition, to accept four if *punctually* paid; this condition must be strictly performed; and the debtor shall *not* have relief in equity after the day of payment is elapsed, (because the 1 per cent. was to be abated upon a condition which is *not* performed: but if 4 per cent. be reserved, with an agreement that if the 4 be not *punctually* paid at the day, the mortgagee shall pay five, that shall be considered as a *penalty added*; and the court of equity will, in such case, *relieve* against it."

Now

Now the present case is, in effect, within the former part of this distinction; for, it is a *condition unperformed*. Therefore the debtor cannot have relief in a court of equity, any more than he can have it at common law: but the creditor has a right to have recourse to his bond.

As to the WAVER—It could, at the most, be only a *constructive* one. But in reality, it is none at all: for, the interest (even upon the sums payable by instalment) is *part* of the original debt due upon and secured by the bond; and therefore the plaintiff was intitled to receive it as *part of the original debt*.

Unless the defendant pays the *whole* money, he cannot be relieved from the penalty. However, *this* rule must *certainly* be discharged; there being *no ground* to make it absolute.

*Mr. Justice WILMOT expressly concurred: and

Mr. Justice DENISON said nothing further in opposition to it.

RULE DISCHARGED, with COSTS
(to be paid by the defendant to the plaintiff.)

Moncaster *versus* Watson et al'.

THIS was a case reserved from the Northern circuit, in an action brought on 2, 3 E. 6. c. 13. by a *lay-impropriator* against the occupiers of lands in the parish of Felton in the county of Northumberland; for taking away their corn and hay, *without* setting out the *tithe*, or agreeing for it.

The substance of the case stated was, that they claimed to be EXEMPT from paying *any tithe at all* for these lands, upon the following foundation, *viz.*

That a private act of parliament was passed in the year 1753, (26 G. 2. c. 46.) "For dividing and inclosing the common called Felton Common in the parish of Felton, in the county of Northumberland."

That the lands in question had been, till the said year 1753, (when the said common was so divided and inclosed)

1763.

BONAFONT V.
RYROT.

* Mr. Justice
Foster was not
present.

(1 Black. Rep.
402. S. C.)

Friday, 22
April 1763.

An exemption
and modus which
did not extend
to common, ex-
empting their
own former
lands from tithes
shall not exempt
the allotted
common.

1763.

MONCASTER

WATSON et al.

PART of the said common, whereupon the commoners had used to have common for their cattle levant and couchant &c.

That 90 acres, part of the said common, were, by the said act of parliament, allotted to the owner of *Swardland demesne*: under which said allotment, the defendants occupy the said 90 acres, formerly parcel of the common, but *now made parcel of Swardland demesne*.

That the act directs that the divided lands (before parcel of the common) shall be holden by each person to whom the respective divisions are allotted, subject to the same charges and incumbrances as *their own former lands* to which they are allotted and consolidated, were before subject: and it is declared in the act itself, "That it be construed *hence-fo* *scially* to the said land owners to whom the respective divisions are allotted."

That the owners of *Swardland demesne* had *never paid* tithe of corn, grain or hay; having been always EXEMPT from the payment of tithe of corn and grain, in consideration of having always kept in repair the North end of *Felton church*; and being EXEMPT from the payment of tithe of hay, under a *modus*.

The question stated upon the case, (and the only question then intended to be brought before this court,) was—

"Whether the occupiers of these 90 acres, *late parcel of the common*, but now allotted to the owner of *Swardland demesne*, are or are not liable to the payment of tithe of corn and hay.

But the counsel, when they came to argue it, made *two* questions, viz.

1st. "Whether *Swardland demesne* was *itself* exempted from the payment of tithe for CORN": (it was agreed to be exempt from tithe of hay, by the *modus*.)

2dly. "Whether the 90 acres of *inclosed common* be exempted from tithe of corn and hay."

However, THE COURT would not enter into the first question ("Whether non-payment of tithes can be set up against a lay-impropriator, as a presumption of title:") because it was never intended by the parties, to be meddled with by the *present* action, most plainly.

As to the 2d question.

Mr. *Wallace*, who argued for the defendants, contended that as the allotment was to bear all the burthens of the ancient estate to which it was now annexed, it ought therefore to enjoy all the privileges of it: and as this ancient estate was exempt from tithes, so also ought the allotted 90 acres to be.

And he relied very much upon a case in the court of chancery, determined by Lord *Hardwicke* on 15th July 1748; which he cited as in point: the name of it was *Stockwell v. Terry*. *Stockwell* was rector of the parish, and filed his bill against the occupier of some land (then plowed up) for tithe of the corn which grew upon it. The defendant insisted upon a *modus* of 15s. in lieu of ALL tithes arising upon the GRANGE farm; and that the GRANGE farm had never paid any tithes. Then he shewed, that the land for which *Stockwell* demanded this tithe of corn by his bill, had been part of a *down* which had been inclosed by a private act of parliament, and had been thereby allotted to and had ever since continued part of the GRANGE farm; and therefore ought to be exempt from all tithes, as well as the GRANGE farm itself. And Lord *Hardwicke* dismissed the rector's bill, so far as it related to this land which had been down-land, and was so allotted to the Grange farm.

Mr. *Thurlow*, for the plaintiff, argued, that notwithstanding this decree in *Stockwell's* case yet in the present case (which differs much from that) the allotted common is not exempted from the payment of tithes.

This demand of the impropiator, in the present case, is a claim of the tithe of corn, grain, and hay. But corn, grain and hay could not be part of what grew on a COMMON: the tithes that arose upon this common (appendant to *Swardland demesne*) could have been only tithes of *agistment*, or of lambs, calves, wool, milk and other things that could be the produce of a common.

Now a *modus* or other compensation must be in lieu of these specific tithes. This exemption therefore can not relate to any other tithes but such as could in their nature have arisen out of the common. So that it is not within the substantial idea of the *modus* or compensation insisted upon by way of exemption from paying tithe for these lands, which were part of the common, but now bear corn, grain and hay. For, the rector could have no benefit from this *modus* which was confined

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confined to the tithe of corn, grain and hay, in respect of any of *that sort* of tithe which could arise from the common, whilst it remained common.

TITHES are not issuing out of the land, but collateral to it: and they cannot be *discharged* but by *special words*; which this act does not make use of, the words of it being only *general words*. *Cro. Eliz.* 161. *Parkins v. Hinde.* 11 Co. 13. b. S. C. 1 Leon. 300. *Stile v. Miller.* *Owen* 39. S. C.

An exemption may be easily *destroyed*. An alteration of the use of the land will destroy it: as where a buck or a doe is to be paid out of a park; and the park is disparked. For which, he cited *Hutton* 58. *Poole v. Reynold* (upon a prescription "To be discharged of all tithes, by delivering deer annually;" and the park was afterwards disparked.)

Here the exemption claimed is, "To be discharged of the tithe of corn, grain and hay arising and growing on Sward-land demesne." But the common now inclosed and allotted was not, whilst it was common, capable of producing either corn, grain or hay. Therefore it is not exempt from tithe of corn, grain and hay.

If a mill be discharged of tithe; and the owner turns the water-course but a very little way, and re-edifies his mill upon such turned water-course, this re-edified mill shall not be discharged. 1 Ro. Abr. 652. Title *Dismes*, Letter F. pl. 27

So that *changing the substance* of the exemption is sufficient to destroy it; even *supposing* it to have been a good one.

LORD MANSFIELD—The case of *Stockwell v. Terry* differed very much from the present case. The *modus* insisted upon in *that case* extended to ALL kinds of tithes: whereas the exemption insisted upon in the present case is *confined* to the *specific land* called *Swardland demesne*, and does not extend to the right of COMMON. Here is no equivalent at all for the tithes of *agistment*; of wool, milk, lambs, or any other tithes of *such a kind* as could arise upon a COMMON. The *equivalent* goes only to corn, grain and hay; the tithe whereof could not arise upon the common, whilst it remained a common.

In the case cited, the rector was, as owner of the glebe, a PARTY to the act of parliament: here, the *impropriator* is not a party to this act of parliament. And there the *modus* covered the right of common: it was a *modus* of 15 s, which was paid for the Grange farm, in lieu of all tithes arising upon

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upon it, "and of ALL the tithes of all the cows and sheep belonging to that farm that should be DEPASTURED ON THE SAID DOWN." (which was afterwards inclosed and allotted to it.) So that the *modus* covered not only the Grange farm itself with its appurtenances, but the common also: (which is not the present case.) Lord Hardwicke decreed, "That *modus* should stand for the allotted lands, as well as for the Grange farm and its appurtenances;" and accordingly, he dismissed the bill AS TO THOSE lands which the MODUS COVERED: but as to all the other lands of the common, which had before used to pay tithe of wool, agistment, and other small tithes, he decreed an account.

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v.
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Here, all rights are SAVED, generally, by this act of 26 G. 2. consequently, the impropiator's right to tithes remains: and there is no need to shew how they are due because they are due of common right.

THE WHOLE COURT were very clear, that in the present case, the exemption and *modus* did NOT extend to the waste and common; and therefore that the allotted lands, which had been part of that waste and common, having been subject to tithes before the allotment, must REMAIN liable to them after it: which they held to differ materially from the cited case, where the *modus* did extend to the waste and common.

They understood the words "Subject to the same charges and incumbrances as their former lands were subject to," to mean only incumbrances upon the estate, (as dower &c;) and not to intend its being subject to the repair of the church of Felton.

See the case of *Lambert v. Cumming*, 21 November 1723, in the *Exchequer*: Bunbury 138.

Lord MANSFIELD said, that case was determined upon the same ground as Lord Hardwicke's decree went upon, viz. That what was before exempted shall remain exempted; and what was not before exempted shall pay tithe.

Per Cur'. unanimously

Let the *posse* be delivered to the PLAINTIFF.

Rex versus Barker et al.'

(1 Black. Rep.
300 352. S. C.)
Thursday 23
April 1763
Leave given to
withdraw return
to mandamus.

UPON Mr. Dunning's motion, consented to by Mr. Solicitor general,

1763.

REX V.
BARKER & al'.
v. ante, p.
1265, 23 Jan.
1762.

THE COURT gave leave to the defendants, to withdraw their * return to the *mandamus*: and a peremptory *mandamus* was, by consent on both sides awarded; (the parties concerned having, since the last motion, gone to a new election.)

PEREMPTORY MANDAMUS
(by consent on both sides.)

Plumer, Spr. *versus* William Marchant, Administrator of Peter Marchant.

Tuesday 3 May,
1763.

Administrator
defendant may
give retainer in
evidence or plead
it, at his liberty.

THIS was a case reserved from the *Sussex* assizes, holden before Mr. Serjeant *Wynne*.

An action of debt was brought, in *Michaelmas* term 1762, upon a bond of the defendant *William Marchant's* intestate, in the penal sum of 200*l*.

The defendant, in *Hilary* term 1763, pleaded PLENE ADMINISTRAVIT.

The plaintiff, in the same *Hilary* term, replied, "That the defendant then had, and on the day of exhibiting the bill had sufficient goods and chattels, &c, to have satisfied to the plaintiff the debt and damages aforesaid." And issue was joined *thereon*.

At the trial, the defendant's counsel offered to give in evidence the following covenant, contained in the aforementioned deed of settlement; viz.

By articles of agreement indented, dated 7th August 1759, made between *Peter Marchant* the elder, of *Hurstperpoint* in *Sussex* gent'. and the intestate, *Peter Marchant* the younger, nephew of the said *Peter Marchant* the elder, of the first part; *Mary Longhurst* of *Limester* in the said county, and *Sarah Longhurst* of the same place spinster, daughter of the said *Mary Longhurst*, of the second part; and the defendant *William Marchant*, and *John Balcomb* of *Angmerring* in the said county, of the third part; after provision being made (in consideration of an intended marriage between the said intestate *Peter Marchant* and the said *Sarah Longhurst*, and of the sum of 330*l*. and upwards, as a marriage portion,) by settlement and surrender of divers freehold and copyhold estates

Which
Marchant

The said
Marchant
the said

estates on the said *Sarah Longhurst* and the issue of the said intended marriage; it was witnessed as follows—

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MARCHANT.

"And the said *PETER MARCHANT the younger*, in consideration of the said marriage, and as a provision for the said *Sarah* his intended wife in case she shall happen to survive him, and for the issue of such intended marriage, doth for himself, his heirs, executors and administrators covenant promise and agree to and with the said *William Marchant* and *John Balcomb* their executors and administrators, that he the said *Peter Marchant the younger* shall and will in and by his last will and testament, OR, *that his executors or administrators shall, within six months after his death, well and truly pay and deliver, either in money, goods, chattels or effects, out of his personal estate, the full sum of 700l. unto the said William Marchant [the defendant] and John Balcomb or the survivor of them, or to the executors or administrators of the survivor of them; and that the interest and produce of the same shall be advanced and paid to the said Sarah, for and during the term of her natural life, for the maintenance of herself, and for the maintenance and education of the children of such marriage: and after her decease, it is declared and agreed to be the intent and meaning of all the said parties to these presents, that the same shall be equally divided amongst the issue of such intended marriage, and to be paid to them respectively as they shall attain to the age or ages of 21 years, or if any of them are daughters or daughter, to be paid respectively to such daughter or daughters at their respective ages of 21 years or day or days of marriage; and in default of such issue at or after the death of the said Sarah Longhurst, to be paid to such person or persons as he the said Peter Marchant the younger shall in and by his last will and testament give, leave and bequeath the same. And for the better performance of the said covenant, article and agreement herein before-mentioned to be by him the said Peter Marchant the younger done, paid and performed, he the said Peter Marchant the younger doth hereby bind and oblige himself his heirs, executors and administrators unto the said William Marchant [the defendant] and John Balcomb their executors and administrators in the penal sum of 1400l."*

Which articles were sealed and delivered by the said *Peter Marchant* and the said *John Balcomb*.

The said marriage afterwards took effect: and the said *Peter Marchant* the husband died *intestate*, in November 1762; leaving the said *Sarah* his widow, but no issue of the said marriage.

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MARCHANT.

The defendant *William Marchant*, the trustee named in the said articles, admits effects sufficient to satisfy the plaintiff's debt; UNLESS he has a right to RETAIN the same, towards satisfaction of the 700*l.* above-mentioned; which he insists, he has a right to do, under the said covenant and deed of settlement; and that, upon his said plea, he might give the above covenant IN EVIDENCE.

The question submitted to the court, is, "Whether the defendant, as administrator of the intestate *Peter Marchant* the younger, could, upon the plea of *plene administravit*, GIVE IN EVIDENCE the covenant abovesetated, to support his plea."

Mr. *Eliab Harvey*, for the plaintiff, argued that he could not.

1st. There can be no retainer at all, in this case; because here could have been no action of debt brought against the defendant as executor; it not being a debt in the testator, and consequently not in the executor: the testator has only covenanted "That his executor shall pay." *Perrott v. Aulstin*, Cro. Eliz. 232. is exprefs to this purport.

So in the present case, no action of debt could have been brought upon this covenant: and as an action of covenant only sounds in damages, this covenant can not be insisted upon by an executor or administrator, to be set off by way of retainer, against the specialty-debt for which he is now sued.

2dly, The ground of retainer, simply, as it stands here, is not sufficient: there ought to be some previous requisition made upon the executor, by the wife or her trustee; or some act of the co-trustee, to justify it. It does not appear that the covenant was or would be insisted upon, against the administrator. Besides, here, the six months after the intestate's death were not expired: and consequently, no right of action had accrued.

3dly, This retainer being attended with very special circumstances, it ought to have been pleaded: and if the truth of the case had been disclosed by pleading, the plaintiff might have then taken judgment of assets, *quando acciderint*. But as "*plene administravit*" was pleaded; and as we knew we could shew assets, and did not nor could know any of this covenant, we are now deprived of this benefit.

4thly.

4thly. This plea is *not substantially true*, "That he has
"fully administered;" when the assets are covered only during
the wife's life.

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PLUMER &
MARSHALL

He therefore prayed, that the *possea* might be delivered to
the plaintiff.

Mr. Cox, *contra*, for the defendant.

1st. This is a *specialty* debt. This administrator, if he
had not been also a *trustee* as well as administrator, might
have *immediately* paid it to the trustee as soon as the intestate
was dead: for, the six months is only an enlargement of the
time of payment, allowed to the defendant for his ease and
benefit: but it is a *debt*, before that. Therefore he may re-
tain it, against a demand of *equal degree*.

2dly. No requisition or other act was necessary. As he
could not sue *himself*, he might retain.

3dly. It was not necessary to *plead* it: this has been long
settled. *Gough's case*, 5 Co. 60.* The plaintiff suffers no
inconvenience from not having judgment of assets *quoad ac-*
ciderint: he may bring a fresh action, (if not have a
† *scire facias*,) as soon as the wife dies. If he had immedi-
ately paid it, he might have given *that* in evidence.

* See Viner, p. 266. Tit. Ex-
ecutors, Ma. 2.
"Administrator
"Defendant may
"give retained,
"in evidence,
"or plead it, &c.
† V. Bro. Executor 18.

"his liberty." Brownl. 75. Bond v. Green. † V. Bro. Executor 18.

Mr. Harvey, in reply—

3d. In *this* method, the plaintiff may *lose* her debt; *an-*
other person may get judgment *before* her.

4th. This is *not, in truth, a full* administration; because
these assets may become answerable for this debt, *after the*
death of the testator's wife.

LORD MANSFIELD—It is now settled, "That a re-
"tainer of a debt may be given in evidence."

And as to the case of *Perrott v. Austin*, in *Cro. Eliz.* It
seems to be an extraordinary one, in itself; and there is a
query upon it, in the very book. Besides, the testator is
here bound in a *penalty*.

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1763.

PLUMER V.
MARCHANT.

The real justice of the case is, that the plaintiff should have judgment of assets, *quando acciderint*.

Mr. Justice DENISON thought it the clearest case that could be, and not to differ from the common case. This is a real debt, and the assets are bound by it; and it is a debt by *specialty*: therefore it is of an *equal* nature with another debt by *specialty*. Consequently, the present action being brought upon a debt by *specialty*, the administrator has a right to retain against it.

This case is just the same as if there were two executors; for, payment to one is payment to both. He may retain what he might have paid.

An action of *covenant* is as much a lien upon the assets, as an action of *debt*.

Judgment of assets, *quando acciderint*, would have admitted the debt.

I see no difference between this case and the common case: the special circumstances signify nothing, here.

Mr. Justice WILMOT had no doubt.

Wherever the executor might have been sued, he may retain. And this is a debt, of *equal* nature with that for which the action is brought. Therefore he may retain.

The intestate was himself bound: and the lien falls upon his representatives, though he *himself* could not have been sued.

But *without that*, I think this is a debt for a sum certain, and *secured* by *specialty*, therefore there is no distinction, whether the man *himself* was to pay it, or his *representatives*.

The assets are bound, so *long* as the woman *lives*. It may happen, (by the co-trustee's surviving the defendant,) that the money may, at her death, be *out of* THIS *man's* hands: in which case, no new action or *scire facias* could have effect against *him*.

Lord MANSFIELD now observed, that there might be difficulties in the method of taking judgment *de bonis quando acciderint*;

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Easter Term 3 Geo. 3. B. R.

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acciderint; (which had, *before*, appeared to him to be the right method :) and therefore

Per Lord MANSFIELD and * both the other JUDGES,
clearly and unanimously

Let there be JUDGMENT of NONSUIT.

1763.

PLUMER V.
MARCHANT.
* Mr. J. Foster
was absent.

D'Ayrolles, Esq; *versus* Howard.

UPON shewing cause against a rule which had been obtained by Mr. Solicitor General (*Norton*) on behalf of the plaintiff, for a *new trial*, upon the foot of a mis-direction by the judge of assize, it appeared that the action was an action of trespass brought by the *lord* of a manor against the *commoner* for *spoiling and destroying his peat*, and *filling up the holes* out of which it was dug. To which, the commoner pleaded a justification under a *right of common* in and through the said waste appendant to his house &c; and that the plaintiff had dug this peat in some parts of the common, and laid it up in other parts of it, whereby the defendant was *hindred from enjoying* his said right of common in so large and *beneficial a manner* as he had used and had a right to do: and therefore he *justifies* the breaking and removing the said heaps, and filling up the holes, doing as little damage as was possible.

Wednesday 4
May 1763.

Upon what issues between lord and commoner, plaintiff cannot give in evidence, that there was sufficiency of common left.

The plaintiff (the lord of the manor) replied, that the defendant did the trespasses *de injuriâ suâ propriâ absque tali causa*. Upon which, issue was joined.

The principal question at the trial was, Whether the plaintiff could, upon *THIS issue*, give in evidence "That there was" a SUFFICIENCY of common LEFT.

Mr. Serjeant *Wynne* (who went as judge of assize to the last *Kingston* assizes) was of opinion, "That, upon *this issue*, "he could not." And

THE COURT now concurred in the same opinion.

But however, as it appeared, that the merits had never been fully tried, they thought, that the present verdict for the defendant should be set aside on payment of costs by the plaintiff; and a new action brought by the commoner, against the lord; in which action, all the matters insisted upon (which were various) might be given in evidence: for, both

1763.

D'AYROLLES

v.
HOWARD.

sides declared a desire to have the real merits fairly and fully tried; viz. Whether the lord had or had not a right, and had always used, to dig peat upon this common, and lay it up there to dry.

V. 1 *Siderfin* 106, *Goe v. Cother*; where the lord dug pitts upon the common.

Rex versus Corporation of West Loe.

Friday 6 May
1763.

Mandamus to go
motion upon
judgment of
quitter, cannot
be moved for,
till judgment be
actually signed.

ON Monday last (the second of May) Mr. *Dunning* moved for a *mandamus* to the corporation, to go to the election of a mayor; there being a judgment of *quitter* against Mr. *Buller*, the late mayor.

Mr. *Webb*, *contra*, then objected that they came too early with their motion: for, that judgment against Mr. *Buller* was not ACTUALLY SIGNED, but only a rule given on the *posse*; which is a four-day rule, and not yet out, (being given but the day before;) so that no judgment can be yet signed; and *non constat*, whether it ever will be.

Mr. *Dunning* relied on a late case, which he said was in point viz. * *Rex v. Ollerhead*, in Easter term 1759, 32 G. 2. where the like *mandamus* was granted on Mr. *Morton's* motion, the day after the giving the rule on the *posse*, and before the signing the judgment,

*Or rather *Rex v. Corporation of Wigan*,

But THE COURT were clear, that if it was so done in that case; it was wrong.

Nothing was therefore taken by the motion of last Monday

THE four-day rule being now expired, the adverse parties had a trial of skill, "Which of them should get the start of the other in moving for a *mandamus*;" conceiving that they should get some advantage, by being before-hand with their opponents.

The prosecutor's clerk in court applied to me, in court, to sign the judgment against Mr. *Buller*: which (as they were now become regularly and indisputably intitled to ask,) I immediately began to do. When I had written (upon the proper stamp parchment) the following words—"On a verdict, judgment is signed for our lord the king against the defendant"—; and before I had proceeded any further towards finishing it and awarding the *capiatur*, ("Let the defendant be taken";)

Mr.

Mr. *Webb*, having pre-audience of the prosecutor's counsel, moved, on behalf of another person, for a *mandamus* commanding the corporation to go to a new election; "Judgment being signed against Mr. *Buller* the preceding acting mayor; whereby the office was become vacant;" and he appealed to me for the truth of his assertion, "That judgment was actually signed against Mr. *Buller*." Whereupon I informed the court, *exactly*, of the abovementioned circumstances.

1763.

REX.
WEST LON
Corporation.

Mr. *Dunning*, on behalf of the prosecutor, objected to Mr. *Webb's* taking the advantage of his pre-audience, to get the start of him in this motion; which he assured the court, he was prepared to have made, as soon as it should have come to his turn to move; and which he could not make till judgment was actually signed.

THE COURT were clear, that the prosecutor was intitled to the * priority of this motion for a *mandamus*; and accordingly

* Vide ante
p. 782 to 785.

Granted it to the PROSECUTOR,
(Upon Mr. *Dunning's* motion.)

Rex versus Thomas Haydon.

(1 Black. Rep.
404. S. C.)

MR. Serjeant *Nares*, supported by Mr. *Stowe* and Mr. *Asphurst*, moved, a few days ago, on behalf of the defendant, to postpone the judgment of the court upon him, till Michaelmas term; having been convicted (as was alledged) upon the single evidence of † *John Burbage*, "Of having promised him to give him 3 guineas, at the election for members of parliament for *Evesham*, &c." which single witness, *John Burbage*, now stands indicted for PERJURY in giving that very evidence, and was indicted for it as early as was possible after committing the crime. They had an affidavit of all this matter, (made by this *Thomas Haydon*.)

Saturday, 7
May 1763.

Witness indicted for perjury, no reason for postponing judgment against the person convicted.

† V. ante
p. 1359. 24
Nov. 1762.

Mr. Solicitor General (*Norton*) and Mr. *Morton*, contra, for the prosecutor, premised, that as this defendant had been heretofore brought up to receive judgment, which was only put off till it should be seen whether any action would be brought against him, the case ought to stand now as it did then; and no subsequent indictment ought to affect it.

And

1763.

REX V.
T. HAYDON.

And they asserted, that he was so far from being convicted upon the *single* evidence of *Burbage*, that even his *own* evidence would have convicted him; and particularly the evidence of one *Penny*, who was called by himself, would *alone* have been fully sufficient to ground the conviction upon, even if *Burbage's* had been totally out of the case.

And they observed that the assignments of *Burbage's* perjury do not go to the point that was *in issue* upon *Haydon's* trial, but to *collateral* instances.

But their grand objection was, that "This *Thomas Haydon*, the defendant, is the first witness upon the back of the bill of indictment;" (which is a precedent of the most dangerous tendency;) and *all or all but one* of the other witnesses thereon, were examined at *Haydon's* trial.

Burbage also offered to take his trial at the last assizes: but this prosecutor did not comply with that offer.

N. B. On viewing the indictment and the names indorsed upon it, it appeared that *HAYDON* himself was the first witness; and that all the rest of the witnesses, except one *Clarke*, were actually examined at *Haydon's* trial.

LORD MANSFIELD—If the court were to defer pronouncing judgment against *Haydon*, he could not be a witness upon the trial of this indictment for perjury against *Burbage*; because he is so much interested in the event of it. And the other witnesses, all but *Clarke*, have already been examined upon *Haydon's* trial; and it does not appear, but that *Clarke* might have been. Therefore there is no reason to defer our judgment.

Mr. Justice WILMOT entirely concurred with his Lordship.

And Mr. Justice DENISON shewed no marks of dissent.

Whereupon, (the time for bringing an *action* being now elapsed,) the defendant *Haydon* came into court: and

THE COURT committed him, and ordered him to be brought up again on this present *Saturday*, to receive judgment; which was—

Easter Term 3 Geo. 3. B. R.

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To pay a fine of 200*l.* and be imprisoned for 3 months, and until the fine be paid.

1763.

V. post. p. 1440. under 22d June 1763.

R. H. V.
T. HAYDEN.

Palmer *versus* Needham.

Monday 9,
May 1763.

THE *original* demand was only 3*l.* 13*s.* 6*d.* The plaintiff brought an action for it; and obtained judgment, with *costs*. The debt and *costs* amounted to above 10*l.* The plaintiff then brought an action of debt upon this judgment; and held the defendant to *special bail*.

Special bail discharged, original debt being under ten pounds.

Mr. Solicitor General had obtained a rule to shew cause why the *bail-piece* should not be discharged, and *common bail* be accepted.

Mr. Eliab Harvey now shewed cause; and insisted, that whether it was or was not necessary to give *special bail* in this case, yet as it was *actually given*, it ought not to be discharged.

But THE COURT were very clear, that as the *original debt* was under 10*l.* the *inhancement* of it by adding the *costs*, and so raising the total to above 10*l.* was not sufficient to oblige the defendant to give *special bail*; the intention of the act being only "That *special bail* should be required where the *original debt* amounted to upwards of that sum." And they were equally clear, that as *special bail* ought not to have been at all required, the *bail-piece* must be discharged, (though actually taken,) and *common bail* accepted.

Note—There was judgment by default; and a writ of error brought: and it was part of the motion, "To stay execution till four days should be expired after the determination of the writ of error."

RULE made ABSOLUTE.

Le Breton *versus* Braham.

Friday, 13
May 1763.

UPON the motion of Mr. Caldecott (made on Saturday last) on behalf of the defendant, the court gave him a rule upon the plaintiff (who was by profession an attorney) to shew cause why proceedings should not be stayed till he should give the defendant an account of his demand; and that the defendant

Plaintiff ought to give defendant particulars of his demand.

1390

Easter Term 3 Geo. 3. B. R.

1763.

LE. BRETON
V. BRANAM.

defendant have time to plead, *till* such account be given her by the plaintiff.

He moved it upon an affidavit "That the plaintiff refused "to acquaint her with the nature or particulars of his demand; and that she had offered to pay him, immediately, "whatever, was due to him from her."

It was an action for money lent, and monies laid out to her use.

Lord MANSFIELD thought it reasonable that in *all* cases, (as well where attornies were plaintiffs, as where other persons were plaintiffs,) the plaintiff ought to give the defendant an account of the particulars of his demand.

The present motion ended in a rule of reference to the master (by consent,) to see what was due.

The End of Easter Term 1763. 3 G. 3.

Note—Mr. Justice FOSTER was absent *all* this term.

Trinity

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*Trinity Term.

3 Geo. 3. B. R. 1763.

• Mr. Justice
FOSTER's
health did not
permit him to
come to West-
minster-hall du-
ring this whole
term.

Rex versus Showler and Atter.

(1 Black. Rep.
419. S. C.)

MR. Eliab Harvey shewed cause against quashing an order of sessions which confirmed an order of two justices of *Lincolnshire-Lindsey*, nominating and appointing *Thomas Showler* and *John Atter*, being substantial householders of the township or village of *Haugh* in the said parts, to be OVERSEERS of the poor of the said TOWNSHIP OR VILLAGE of *Haugh*, for the year next ensuing, according to the direction of the statute in that case made and provided; and also against quashing the said original order of the two justices. The case was, as follows.

Friday 3
June 1763.

Order for the
appointment of
overseers of the
poor for village
or township
quashed, because
the place was
not so.

THOMAS SHOWLER, one of the said overseers so appointed, having appealed to the general quarter-sessions, from this warrant or order of appointment, the first sessions adjourned it to the next. They state, that it appears to them, that the said *John Atter* in the said appointment named is a *day-labourer*; and that the said place called *Haugh* consists of a *capital messuage*, in which, *Thomas Showler* in the said appointment named, with all his family dwells; and of *two small antient cottages*; and of *one other small cottage, lately built*; all which cottages are let along with the said capital messuage and the farm thereunto belonging, to the said *Thomas Showler*; and of *another tenement*, part of the said capital messuage; and all of them inhabited by families; and that one of the cottages is inhabited by the said *John Atter* and his family; and another of the said cottages is inhabited by another *day-labourer*, and his family; and the other of the said cottages is inhabited by a shepherd and his family; and the tenement part of the said capital messuage is inhabited by a poor widow
and

1763.

REX V.
SHOWLER
and Another.

and her 5 children: *all* which occupiers of the said cottages, and of the said tenement part of the said capital messuage, are *under-tenants to the said Thomas Showler*. The said court of sessions therefore orders and adjudges "That *Haugh* afore-
" said is a village or township; and that the said warrant or
" order of appointment be confirmed."

Mr. *Harvey* and Mr. *Kemp*, in answer to the two objections that had been made to these orders, (*viz.* 1st. "That the facts
" stated shew that this place is *neither a township nor a vil-*
" *lage*;" 2dly. "That *Atter* appears to be only a labourer,
" not a substantial householder;") insisted.

1st. That the sessions have determined right in adjudging *Haugh* to be a village: for, it appears upon the state of the case, to be so.

1 *Inst.* 115. defines a village, as consisting *ex pluribus mansionibus et pluribus vicinis*. And here are *five* distinct man-
sions: which number answers to the term "*plures*."

And both *Spelman's Villare Anglicanum* and *Cambden's Britannia* mention this place as a village: which is, at least, a reason for sending the order back to the sessions, in order that the facts may be more fully stated.

They said, the two cases cited out of Sir *John Strange's* Reports, *viz.* 2 Sir *J. S.* 1084. *Denham v. Dalham*, and 2 Sir *J. S.* 1071. *Stoke-prior and Grafton*, are not applicable to the present case. For, the § former was upon an order of removal: and *Southwold park*, the extraparochial place, consisted of *only two* houses and two families; which could not be called *plures* †. The latter was a nobleman's seat, converted *within time of memory* into five houses and farms: but that case was *never argued*; and the rule was made absolute without defence.

§ See my Set-
tlement Cases,
No. 11. Rex v.
Inhabitants of
Denham.

† See my Set-
tlement Cases,
No. 31.
Rex v. Inhabi-
tants of the
manor of Grafton.

THE COURT were clearly and unanimously of opinion
" That both these orders ought to be discharged."

LORD MANSFIELD observed, that by this method, a place might be *made* into a village which in fact was not so; and the inhabitants of it might by this contrivance *withdraw* themselves from contributing towards the support of the poor of their parish.

If it be really a vill, you may make another appointment.

Mr.

Mr. Justice WILMOT cited and laid a good deal of stress upon a case in M. 1740, 14 G. 2. B. R. * *Rex v. inhabitants of Welbeck* : which Mr. Justice Denison also said he very well remembered. It was a *mandamus* to appoint overseers in and for the village of *Welbeck* : and the return was, "That it was extraparoehial, and is not nor was, nor is or ever was reputed to be a village or a township; and therefore they cannot appoint any persons to be overseers of the poor of it." And this return was allowed; upon the principle "That the court have no power to issue such *mandamus*, but upon the supposition of its being a vill or township."

1763-

REVEREND
SHOWLER
and Apothecary

* V. a Sir
J. S. 1743.

BOTH ORDERS QUASHED.

Note—Their answer to the 2d. objection was, that the original order expressly called *Atter* "a substantial householder."

But, as the Court were so clear against the orders upon the first objection, as to how it without even hearing the counsel who were to argue in support of it; this second objection was not discussed, nor even entered into.

Bates *versus* Gamble.

Saturday, 4
June 1763.

UPON the application of an insolvent debtor, on 32 G. 2. c. 28. § 13. The court ordered the petitioning debtor to be brought up again upon the last day of this term, (instead of the first day of the following term.) For, this last act only directs, in general "That the court shall by order or rule cause the petitioning prisoner to be brought up on some other day to be appointed by such said Court, some time at furthest, within the first week of the term next following the time of such examination; but SOONER, if any such court shall so think fit." And as these persons live both in the same town, and the plaintiff has already had a copy of the schedule 14 days at least, (as the act requires,) it would be hard to keep the defendant in prison during the whole long vacation.

When insolvent debtor to be brought up a second time.
† p. 439.
(Part of § 13.)

N. B. By 2 G. 2. c. 22. § 9. p. 424. If the creditor be not satisfied, but shall desire further time to inform himself, the court shall remand the prisoner, and appoint another day some time within the first week of the term next following, (which was the former practice.) But the present act leaves the time of bringing the prisoner up again, to the discretion of the court.

Glover

1763.

(1 Black. Rep.
396. 399. 405.
422. S. C.)

Tuesday, 7
June 1763.

Insurance on
goods does not
extend to res-
pondentia inter-
est.

Glover *versus* Black.

THIS was a case reserved at the sittings before Lord Mansfield, at Guildhall, after Michaelmas term 1762.

It was an action on the case upon a policy of insurance bearing date the 16th of December 1760, made on GOODS and MERCHANDIZES laden or to be laden on board the good ship or vessel called the *Denham*, whereof was master captain *William Tryon*, "AT AND FROM BENGAL to any ports or places whatsoever in the *East Indies*, until her safe arrival in *London*:" which policy was underwritten by the defendant for 200 l. for a premium of 10 l. per cent.

The plaintiff declared for a total loss.

The defendant pleaded the general issue.

The cause coming on to be tried at Guildhall, London, on 1st December 1762, before Lord Mansfield, it appeared in evidence.

That the defendant underwrote the policy and received the premium, as stated in the declaration.

That before the underwriting of the policy, the plaintiff had lent to *William Tryon* the master of the ship, UPON THE GOODS then laden and to be laden on board the said ship on account of the said *William Tryon*, the sum of 764 l. at RESPONDENTIA: for which a RESPONDENTIA-bond was executed by captain *Tryon* and one *Joseph Bussell* to the plaintiff. The bond was in common form; and recited "That the above named *Alphonsus Glover* had on the day of the date lent and advanced unto the above bounden *William Tryon* the sum of 764 l. UPON THE MERCHANDISES AND EFFECTS laden and to be laden upon the account of the said *William Tryon* on board the good ship or vessel called the *Denham*, of the burthen of 499 tons or thereabouts, now in the river of *Thames*, whereof he the said *William Tryon* is the commander." And the condition was, "That if the said ship should with all convenient speed proceed and sail from and out of the said river of *Thames* on a voyage to any parts or places in the *East Indies*, *China*, *Persia* or elsewhere beyond the *Cape of Good Hope*, and from thence should sail and return into the

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BLACK.

" said river of *Thames* at or before the end or expiration of
 " 36 calendar months to be accounted from the day of the
 " date of these presents; and that, without deviation (the
 " dangers and casualties of the seas excepted;) and if the
 " abovebouden *William Tryon* and *Joseph Bustoll*, or either
 " of them, their or either of their heirs, executors or admi-
 " nistrators should within 30 days next after the said ship or
 " vessel should be arrived in the said river of *Thames* from
 " the said voyage, or at the end and expiration of the said
 " 36 months to be accounted as aforesaid (which of the same
 " times shall first and next happen) well and truly pay or
 " cause to be paid unto the said *Alphonsus Glover* his executors,
 " administrators or assigns the sum of 1008 *l.* and 9 *s.* of
 " lawful money of *Great Britain*, together with 12 *l.* and 4 *s.*
 " of like lawful money by the month, and so in proportion
 " for a greater or lesser time than a month, for all such time,
 " and so many months as shall be elapsed and run out of the
 " said 36 months over and above 20 months to be accounted
 " from the date of these presents; or in the said voyage
 " and within the said 36 months to be accounted as aforesaid,
 " an UTTER LOSS of the said ship by fire, enemy's men of
 " war, or any other casualty, shall unavoidably happen, and
 " the said *William Tryon* and *Joseph Bustoll* or either of them,
 " their or either of their heirs, executors or administrators
 " should within 36 calendar months next after such loss pay
 " and satisfy unto the said *Alphonsus Glover* his executors, ad-
 " ministrators or assigns a just and proportionable AVERAGE on
 " all the goods and effects of the said *William Tryon* carried from
 " *England* on board the said ship, and all other goods and ef-
 " fects which the said *William Tryon* shall acquire during the
 " said voyage, and shall NOT be unavoidably lost; then the above
 " written obligation to be void; or else to be and stand in full
 " force, virtue and effect."

That on the 31st of *March* 1760, the said ship *Denham*
 was at *Fort Marlborough* in the *East Indies*, within the limits
 insured; and had then and at the time of the loss hereafter
 mentioned, divers goods and merchandizes on board her, which
 were the property of the said *William Tryon*, and of greater va-
 lue than all the money he had borrowed.

That on the said 31st of *March* 1760, the said ship, with
 her lading on board her, was BURNT at *Fort Marlborough*
 aforesaid; and thereby ALL the goods and merchandizes aforesaid
 of the said *William Tryon* were TOTALLY consumed and lost.

THIS proof being given of the PLAINTIFF'S INTEREST, the
 jury found a verdict for the plaintiff, subject to the opinion of
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the court, "Whether, on THIS evidence, the plaintiff was intitled to recover on this policy."

See the statute of 19 G. 2. c. 37. § 5. whereby it is enacted "That all money to be lent on bottomree or at *respondentia*, upon any ship belonging to any of his majesty's subjects bound to or from the *East Indies*, shall be lent only on the ship, or on the merchandize or effects on board of such ship; and shall be so expressed in the condition of the bond; and the benefit of salvage shall be allowed to the lender his agents or assigns; WHO ALONE shall have a right to make assurance on the MONEY so lent. And no borrower of money on bottomree or at *respondentia* shall recover more on any assurance, than the value of his interest on the ship or in the merchandizes or effects on board; exclusive of the money so borrowed. And in case it shall appear that the value of his share in the ship or in the effects on board doth not amount to the full sum or sums he hath borrowed, such borrower shall be responsible to the lender for so much of the money borrowed as he hath not laid out on the ship or merchandizes laden thereon, with lawful interest for the same, together with the assurance and all other charges thereon, in the proportion the money not laid out shall bear to the whole money lent, notwithstanding the ship and merchandizes be totally lost."

This case was first argued on Tuesday 1st of February 1763, by Mr. Yates for the plaintiff, and Mr. Harvey for the defendant; and again on Tuesday 26th of April, by Mr. Morton for the plaintiff, and Mr. Solicitor General (Norton) for the defendant.

THE COUNSEL for the plaintiff insisted that the lender of this money had an INTEREST in the goods, though they were the property of the borrower: the lender is the trader, against the risque of the sea.

Respondentia is an interest that may be insured: and it is not necessary to SPECIFY in the policy, "That it is a *respondentia* interest only, which is insured." It appears by 19 G. 2. c. 37. § 5. that a *respondentia* interest may be insured as merchandize: and this insurance is upon goods and merchandize.

Here could be no fraud: nor is any pretence of fraud proved. If the insurer had had a double interest, both of goods and of *respondentia*, the insurance would have covered both.

They

They cited *Godin et al. v. The London assurance company*,* where *Meibohm* and *Tamez* had both of them consigned goods to *Amyand*; and both insured: and it was holden that as each had a separate interest, each might insure.

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BLACK.

THE COUNSEL for the defendant insisted, that the lender of money upon *respondentia* has NO interest at all in the GOODS that the borrower either carries out or may acquire in *India*: and consequently, he can not insure them. The borrower had the whole disposal of them: he was only bound to allow for the salvage, if any happened upon the loss of them. The whole of the bond turns upon the SHIP's returning in safety. The lender has nothing to do with the goods.

* V. ante,
vol. 1. p. 489.

This therefore differs greatly from a mortgage, where the thing mortgaged is bound to the payment of the debt; and therefore a property in the thing mortgaged is vested in the mortgagee, and he may insure it: whereas the lender on *respondentia* has no sort of property or interest, either general or special, in the goods.

Upon *East India* voyages, five things may be insured; viz. goods, *respondentia*, bottomree, freight, and the ship itself: but it is absolutely necessary that each be particularly SPECIFIED in the policy: and the *respondentia* interest in this case ought to have been so. For, an insurance on a ship is no insurance of freight, though it be the same owner: much less is the general insurance on goods, the property of one person, an insurance of a *respondentia*-interest of another person.

An insurance on goods can only mean such interest as the proprietor of the goods had: and here the property and possession both remained in *Captain Tryon* only.

The under-writer ought to be apprized WHAT it is, that he does insure: and it is extremely easy for the insured to specify this particular interest. But the insurer can not otherwise be apprized of it: and it would be most unreasonable that the insured should avail himself of a concealed particular interest, under a general expression, CONTRARY to custom and usage.

There is a settled known form of insuring the *respondentia* and the bottomree interest specifically and nominatim. And this is the very first instance of such a claim as this, except that of one Mr. *Edwards*, of a loss founded upon a *respondentia*-bond:

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BLACK.

But there the insurers refused to pay it; and *Edwards* acquiesced, and received back his premium.

The custom of all insurances is to mention the thing insured precisely: and a strong reason why it ought to be ascertained, is, because the course of returning the premium, or part of it, differs according to the different nature of the thing insured. The under-writer returns to the insured so much of the premium as there was, in fact, *no risque upon*. But there would be an end of all chance of that, if the lender of money on *respondentia* could insure it as goods: for, if the ship came home safe, he might receive his whole PREMIUM BACK, upon shewing "That he had no goods on board;" and yet might keep this his *respondentia* interest IN PETTO, to claim upon it, in case the ship should be (as it was here in fact) *lost*.

Therefore proof of a *respondentia-interest only* is no evidence to subject the insurer to the payment of the money thus pretended to be insured by the lender without specifying it.

According to the latitude here taken, the insured might make his election after the event; and it would lie quite open to fraud and uncertainty, if he should be left to declare in future, what it was that he meant to insure, after the event has happened. This cannot but be introductive of fraud.

Nay further, this is a fraud. This money lent is to be repaid on the return of the ship to the port of London; the risque is "At and from LONDON to London: whereas the present insurance is only "At and from BENGAL to London;" which is enough to answer for the safe bringing home of *Glover's goods from India*; but was only an insurance of half his *respondentia-interest*; as an insurer on *respondentia* runs the risque of the whole voyage. Therefore it never was originally intended to include the *respondentia* interest in the present policy. So that here is an apparent fraud upon the face of the policy.

By 19 G. 2. c. 37. (which was made to prevent wagering policies,) the insured ought to have an interest on board, equal to the sum insured. In *respondentia-insurances* there is always a clause, "That the *respondentia-bond* shall of itself be a proof "that there is such an interest on board:" and the PREMIUM is accordingly. Many insurers will not insure *respondentia* interest at all: and that very circumstance proves that it ought to be specifically named.

In

In case of a *general average*, the insurers of a *respondentia*-interest never contribute: the average is always contributed to by the insurers on the goods.

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BLACK.

In *Godin's* case, both the insured had a property in the goods. But that case is by no means a proof "That a *respondentia*-interest can be insured as goods."

Therefore they concluded that the plaintiff can no recover upon *this* policy, without shewing some interest in the goods.

THE COUNSEL for the plaintiff, in reply, said this was the plainest case possible.

Before 19 G. 2. c. 37. Any man might have been insured, though he had no interest at all. Since that act, it is necessary to prove an interest.*

* 55.

A *respondentia*-interest is an interest: and there is no more reason for specifying *this* interest, than for specifying the particular sorts of goods insured. The plaintiff was a creditor upon the voyage: and he has proved his loss.

The under-writer could not have been in a better case, if he had known what sort of interest the plaintiff had, than if he did not know it; nor could he have expected a larger premium.

It may perhaps sometimes be the interest of the *respondentia* creditor, to name it in the policy; because it frees from average, and he is yet intitled to the benefit of salvage.

As to fraud—the lender might have been satisfied to stand his own insurer outwards; and might afterwards see reason to insure his interest homewards. But no fraud appears; nor was there the least attempt to prove any: therefore none shall be presumed or imagined.

THE COURT took some time to think of this case. And now

Lord MANSFIELD delivered their resolution; (which, he said, they had very fully considered.)

He owned, that at the trial, and also since, upon the argument here, he did lean to support this insurance: and his reason for so doing was, that he was satisfied of it's being a fair

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BLACK.

fair insurance; and that the doubt which had arisen upon it was only occasioned by a slip in omitting to specify (as it was intended to have been done) "That this was a respondentia-interest."

The ground of supporting this insurance, if it could have been supported, was a clause of the act of 19 G. 2. c. 37. viz. the 5th section; which runs in these words—"That all
" and every sum and sums of money to be lent on bottomree
" or at *respondentia* upon any ship or ships belonging to any
" of his majesty's subjects bound to or from the *East Indies*,
" shall be lent *only on the ship, or on the merchandize or effects*
" laden or to be laden on board of such ship; and shall be
" so expressed in the condition of the bond; and the *benefit of*
" *salvage shall be allowed to the lender* his agents or assigns,
" *who alone shall have a right to make assurance on the mo-*
" *ney so lent. And no borrower of money on bottomree or*
" *at respondentia as aforesaid shall recover more, on any assu-*
" *rance, than the value of his interest on the ship or in the*
" *merchandizes or effects laden on board of such ship; ex-*
" *clusive of the money so borrowed: and in case it shall ap-*
" *pear that the value of his share in the ship or in the mer-*
" *chandizes or effects laden on board doth not amount to the*
" *full sum or sums he hath borrowed as aforesaid, such bor-*
" *rower shall be responsible to the lender for so much of the*
" *money borrowed as he hath not laid out on the ship or*
" *merchandizes laden thereon, with lawful interest for the*
" *same, together with the assurances and all other charges*
" *thereon, in the proportion the money not laid out shall*
" *bear to the whole money lent, notwithstanding the ship*
" *and merchandizes be totally lost."*

Now this act, to the purpose of *insurance*, considers the borrower as having a right to insure *only for the SURPLUS value*, over and above the money he has borrowed on bottomree or at *respondentia*. And lenders at *respondentia* or on bottomree may, to many purposes, be said to have a LIEN.

Yet we are ALL very well satisfied, after a more particular consideration, "That this act of parliament never meant or intended to make any alteration in the manner of insurances. It's view was to prevent gaming or wagering policies, where the insurer had no interest at all. And if the lender of money at *respondentia* was to be at liberty to insure for more than his whole interest, it would be a gaming policy: for, it is obvious, that if he could insure all the goods, and insure his *respondentia* interest besides, this would amount to an insurance beyond his whole interest.

The

1763.

Glover v.
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v. § 6.

The act considers the *form* of the policies just as they stood before the making of it; and provides, * that on all actions brought on policies of assurance, the plaintiff or his attorney or agent shall, within 15 days after he shall be required by the defendant or his attorney or agent, declare in writing "What sum or sums he hath assured or caused to be assured in the whole, and what sum he hath borrowed at *respondentia* or bottomree for the voyage or any part of the voyage in question in such suit or action." And in describing *respondentia* interest, it gives the lender alone a right to make insurance on the money lent. So that this act left it upon the PRACTICE.

His lordship said, he had looked into the *practice*; and he found that *bottomree* and *respondentia* are a particular species of insurance in themselves, and have taken a particular denomination: and he could not find even a *dictum*, in any writer, foreign or domestic, "That the *respondentia*-creditor may insure upon the goods as goods." And in this very case, the *respondentia*-interest was intended to have been specified; but was omitted to be so, by mistake.

He declared, that he found, by talking with intelligent persons very conversant in the knowledge and practice of insurances, "That they always do mention *respondentia*-interest whenever they mean to insure it."

This their present determination would not, he said, interfere with that of *Godin et al. v. London assurance company*, with regard to a lien on the goods; because this kind of interest has taken a particular denomination.

It might be greatly inconvenient, to introduce a practice contrary to general usage. And there may be some opening to fraud if it be not specified.

He declared the ground of the present resolution to be this—"That it is established now, as the law and practice of merchants, that *RESPONDENTIA* and *BOTTOMREE* must be mentioned and specified in the policy of insurance." But he declared, at the same time, that they did not mean to determine generally, "That no special interest in goods may be given in evidence, in other cases than those of *respondentia* and *bottomree*, if the circumstances of the case shall admit of it."

PLAINTIFF to be NONSUITED.

1763.

Tuesday, 7
June 1763.

Toll thorough
requires a confi-
deration to be
shewn, in order
to support the
demand of it.

Mayor of Yarmouth *versus* Eaton.

THIS was an action upon the case on *assumpsit*. The declaration contained ten counts; which, in substance, amounted to no more than *this*, that the plaintiffs and those whose estate they have, have had and received, and been used and accustomed, and have a right to have and receive a certain TOLL upon exportation of corn and grain from their port of *Great Yarmouth* to parts beyond sea: and that the defendant exported certain quantities of corn and grain, without paying the toll.

The defendant demurred specially to the six first counts, and also to the ninth: and to the 7th, 8th, and 10th he pleaded the general issue, "*non assumpsit*."

The plaintiffs joined in demurrer, upon the other seven counts.

The present argument turned singly upon the *cause* of demurrer to the first count, (which *same* cause was also assigned in the other six demurrers.) So that it will be sufficient, if this first count be particularly stated, without meddling with the rest.

It was in these words—"Whereas the burrough of *Great Yarmouth* in the county aforesaid now is, and from time whereof the memory of man is not to the contrary, hath been an ancient burrough; and whereas the said mayor, aldermen, burgeses and commonalty of the burrough of *Great Yarmouth* aforesaid, on the first day of *May* in the year of our Lord 1752, and long before, and ever since, had and received, and have used and been accustomed and of right ought to have had and received, and still of right ought to have and receive a certain DUTY or TOLL, called *measurage*, of and from every merchant exporting corn or grain, in any ship or vessel, from the port of *Great Yarmouth* aforesaid to parts beyond the seas; to wit, two pence by the last for every last of corn or grain measured and exported as aforesaid; the said mayor, aldermen, burgeses and commonalty in fact say, that the said *Christopher Eaton*, between the said first day of *May* in the year of our Lord 1752 and the first day of *April* in the year of our Lord 1762, being a merchant exporting as aforesaid, did export, in certain ships or vessels from the port of *Great Yarmouth* aforesaid

"aforesaid to parts beyond the seas, divers last of corn and grain, to wit, 30000 last of corn and 30000 last of grain measured: by reason of which said premisses, the said Christopher Eaton became liable to pay to the said mayor, aldermen, burgesses and commonalty the sum of 500*l.* of lawful money of Great Britain, being two pence by the last for every last of the said corn and grain so exported by him as aforesaid; that is to say, at Great Yarmouth aforesaid; and being so liable, the said Christopher, in consideration thereof, afterwards to wit on the same first day of April in the year of our Lord 1762, at Great Yarmouth aforesaid, undertook, and to the said mayor, aldermen, burgesses and commonalty then and there faithfully promised to pay to them the said sum of 500*l.* when he should be thereunto afterwards required."

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The SPECIAL cause of demurrer was assigned by the defendant in the following words—"And for causes of this demurrer in law, the said Christopher, according to the statute in such case made and provided, assigns the following objections, that is to say, for, that the said mayor, aldermen, burgesses and commonalty have NOT shewn or alledged in the said first six counts of the above declaration, or in any of those counts, ANY BENEFIT which the said CORPORATION perform or are bound to perform to the PUBLIC, OR ANY CAUSE or CONSIDERATION whatsoever UPON WHICH their pretended prescription is FOUNDED: and for that the said six counts are and each of them is, in other respects, insufficient and defective, in form, &c."

The single question upon this demurrer was, "Whether it was incumbent upon the plaintiff, in this action on *assumpsit*, to set forth in his declaration a CONSIDERATION for the toll which he demands."

It was argued, first, on Friday the 29th of April last, by Mr. Yates for the defendant, and Mr. Wallace for the plaintiff; and again now, by Mr. Willes for the defendant, and Mr. Solicitor General (Norton) for the plaintiff.

THE COUNSEL for the defendant argued that as this was not an action brought against a wrong-doer, for a *tort*; but an action grounded upon a demand of a RIGHT, it was necessary for the plaintiff to shew a consideration for the right he demands: and to prove the distinction between actions against wrong-doers, for *torts*; and actions which demand a right; they cited Owen 109. *Esco* against *Laureny*, in B. R. And it is more especially necessary in the present case, as this

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is a claim against the general and common right of the subject, which is antecedent to every usage and prescription; and grounded upon a prescription which affects the public.

To support this manner of reasoning, they cited *Cro. Jac. 213. Buckingham v. Costantine*: where a declaration in assumpsit was holden to be ill, because it did not shew for what cause the debt became due.

And they observed that a man can not prescribe to have thorough-toll without alledging a special consideration.

They cited and argued from the cases in 2 Ro. Abr. 522. Title Toll, letter B. pl. 1. Sir William Jones 162. Roy v. Corporation of Boston. Moore 574. Smith v. Shepherd. 1 Mod. 47. Haspurt and Wills. 1 Mod. 104. Warren and Prideaux. 2 Lev. 96. Prideaux v. Warne S. C. 2 Lutw. 1519. Wilkes v. Kirby; and 1 Sir J. S. 1228. Sargent v. Reed. And 4 Mod. 319. Warrington v. Moseley proves, they said, that some reason ought to be shewn why this duty is claimed. So also does the case of the mayor of Nottingham v. Lambert, 11, 12 G. 2. in C. B. on a special verdict: where, no consideration appearing, the court would not intend any, and gave judgment against the plaintiff.

There is no difference, they said, between it's being upon a declaration, and it's being upon a plea; where the question turns upon a claim of right; especially, where the claim is against the general right of the subject.

They made a difference between prescriptions for private rights and prescriptions that affect the public. They admitted, that in the former, a consideration may be implied: but in the latter, a sufficient consideration must be shewn.

They admitted also, that even in this case, if it had appeared upon the declaration, "That the corporation were owners of the port," that would have been a sufficient consideration.

But it does not appear any where upon this declaration, even that the corporation are owners of the port: the public are the owners of it. And the implied consideration for a port-duty can only be where the PLAINTIFF is owner of the port. 21 H. 7. 40. Hob. 175. *Topsall v. Ferrers*.

THE COUNSEL for the plaintiffs answered, that thorough-toll has no similitude to the present case: that is for passing through a town, in the highway; which, by common law and

and common right, is free to every body. Therefore it may there be necessary to alledge a special consideration.

But the present case IMPLIES a consideration: it is a port granted to the corporation; and was made out of private property. The public therefore in this case enjoys a benefit which it had no pretence of claim to, by common law: and this alone is a sufficient consideration.

2 Lutw. 1519. *Wilkes v. Kirby* is the same point as the present: and though that case was not determined, yet the court strongly inclined "That the owner of a port may have a toll by prescription, WITHOUT alledging any consideration."

But 3 Lev. 37. *Mayor and commonalty of London v. Hunt*, in the Exchequer Chamber, is in point, it was assumed for weighage of goods brought into the port of London: and objection was taken, "That there was no consideration for the duty." But it was resolved "That the defendant had the liberty of bringing them into port; which is a place of safety, and it therefore implies a consideration in itself."

And so also was a late case in C. B. *The corporation of Exeter v. Trindel*, Tr. 32, 33 G. 2: where the title to the toll was set out precisely as it is here; and the defendant demurred generally to the declaration. The case was twice or thrice argued upon this very objection now taken here, "That no consideration for the duty was set forth;" and all the objections there taken (which were the same as were now taken) were over-ruled: and it was holden, "That if it had gone to a trial, the plaintiff must have proved a title; and that a liberty to bring goods into a port is in itself a good consideration for the toll."

As to it's not appearing upon the face of the declaration "That the corporation are OWNERS of the port;"—We have shewn "That they have always been accustomed to receive the toll, and that they always have received it, and that they are intitled to receive it;" and all this must have been proved at the trial, if it had gone on to a trial: and if their being owners of the port was necessary, it must have been proved at the trial.

But, however, a person may be intitled to the toll, without being owner of the port: for, the crown may surely grant the duty, though they retain the port; and the grantee may prescribe for it.

This

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This is good enough, on demurrer: it is *not assigned* for cause of demurrer; and it is therefore upon the same foot as if it was a *general* demurrer. In *assumpsit*, the debt is the consideration. *Hibbert v. Courtbors*, *Carth* 276.

THE COUNSEL for the defendant, in reply, admitted that if goods are brought into a port and unladed, a consideration for the duty to the owner of the port shall be implied. But here the plaintiffs do not shew that they had *any sort of right* to the port, or any thing to do with it. The cases, therefore, where the plaintiffs *had a right* to the port, do not apply to *this* case, where they have it *not*. But cases of thorough-toll are applicable to the present case; as they prove "That a public right can not be abridged without a consideration." And though in *private* prescriptions, a consideration may be implied; yet in those which go to the abridgement of *public* rights, it is *not* so.

The only case in point cited on their side is that of the *mayor of Exeter v. Trinlet*: but it is a *single* case; and is contrary to that of the *mayor of Nottingham v. Lambert*; and was on *general* demurrer, whereas this is on *special* demurrer, for *this* cause particularly assigned. Upon a *general* demurrer, the court might not consider it as matter of substance.

If the crown could grant the duty, reserving the port; yet the plaintiff's must *shew* the grant.

LORD MANSFIELD—This is a very plain case, indeed. The plaintiffs set out that they have a right, by prescription, to the port-duties of *Yarmouth*.

The question is, "Whether they are obliged to *set out a consideration*."

The only cases like the present, are *cases for PORT duties*: the rest are all out of the case.

THE MAKING A PORT is *itself* a consideration. It is a self evident convenience to the merchant: it speaks for itself. It may *never* require repair: therefore I do not know that it is necessary to *shew* repair.

The ownership of the soil is out of the case.

But

But here is a *precedent in point*, established by a judgment of a court in *Westminster-Hall*, upon solemn argument, and after considering all the former cases and precedents: and this precedent is punctually followed in the present case.

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THIS *alone* would be sufficient, if the *reason* of the thing was not so strong as it is.

Mr. Justice DENISON also thought it good, notwithstanding the special demurrer.

He thought the title sufficiently shewn. A port may not want repair in 200 years.

The declaration shews a prescriptive title time out of mind, for these port-duties. The consideration is self-evident; viz. the *benefit to the subject*. It is not necessary to shew that the corporation are OWNERS of the *soil*, or *repair* it. It is not now necessary to shew repairs of a pew in a church; because it may scarce ever *want* repairing.

And here is an established *precedent*, besides the self-evident consideration. This is *not* like the case of *toll-thorough*.

Mr. Justice WILMOT remembered the case of *the mayor of Nottingham v. Lambert*; and observed, that though that was said there "That the plaintiffs could not have recovered, for want of shewing that the corporation were lords of the manor," yet it could not alter the judgment in that case.

As to the *consideration*—It was most fully settled in the case of *the mayor of Exeter v. Trinlet*: it was clearly held, "That in a *toll-thorough*, a consideration must be shewn, because *against common right*; but that a *port-duty* did of *itself* IMPLY a consideration, to support it." This I take to be settled.

The next question is, "Whether the corporation have shewn a title to receive it." And I think there is such a title shewn.

THE CROWN has a right to *create* the duty, and to *grant* the duty to another. This prescription is equivalent to such a grant; and presupposes it.

Per Cur.

JUDGMENT for the PLAINTIFFS.

But

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But Mr. *Willes* prayed leave to withdraw his demurrer, and to have leave to plead: which the court thought reasonable; and Mr. Solicitor General consenting, (though it was asked late, and after a rule "To plead as they would stand by;") the court granted.

Lord MANSFIELD—Well! I hope the precedent of *this* declaration is now sufficiently established.

(1 Black. Rep.
413. 423. S. C.)
Friday 10 June
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Wharfingers in
London are not
intituled to whar-
fage for goods
unladen into
lighters out of
barges, fastened
to their wharfs.

Stephen and Another *versus* Costor and Another.

THIS was a special case reserved at *nisi prius* before Lord Mansfield at Guildhall.

It was an action upon the case on *assumpsit*, for WHARFAGE and CRANAGE due to the plaintiffs as wharfingers and possessor's of BROOK'S WHARF in London, for sundry parcels of malt brought to, and unloaded AT their wharf.

The declaration set forth, that the plaintiffs are wharfingers, and have been and are possessed of the wharf, &c; and are intituled to a TOLL of 6d. a score for all malt brought to and unloaded at their wharf: and it set forth the act of parliament of 22 C. 2. c. 11. § 21. which enacts that such rates and no other shall be taken for wharfage and cranage as by his majesty, with the advice of his privy council, shall be assessed and allowed to be taken; and obliges wharfingers, under a penalty, not to refuse to suffer any goods or merchandize to be landed or shipped at or from their wharf, at the rates aforesaid.

It likewise set out sections 44, 45, 46 of the said act.

Then it shewed, that an order of council was made on the 1st. of March 1674, pursuant to the said act of parliament of 22 C. 2. c. 11. § 21: by which order, malt is rated at 6d. per score.

Then it averred, that the defendants were consignees of the cargo of a West-country barge, which came loaded with malt to the plaintiff's said wharf, and was fastened at and lay there; and that part of the said loading was there landed, and other part, though NOT ACTUALLY LANDED UPON the wharf, was put on board of lighters, whilst the said barge remained fastened to their wharf. And therefore they demanded

demanded the duty of 6d. per score upon the whole cargo; as well what was so put on board the lighters whilst the barge was FASTENED to their wharf, as what was actually landed UPON it.

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The case stated for the opinion of the court was as follows.

That an order of assessment or allowance of rates to be taken at *Brook's wharf* or key, mentioned in the declaration, was, on the 1st. of *May*, 1674, made by his late majesty King *Charles the Second*, with the advice of his privy council, in the following words, *viz.*

Whereas by a late act of this present parliament made in the two and twentieth year of his now majesty's reign, intituled "An additional act for rebuilding of the city of *London*, uniting of parishes, and rebuilding the cathedral and "parochial churches within the said city," it is by several clauses in the said act contained (amongst other things) enacted, that there shall be left a convenient tract of ground all along from *London bridge* to the temple, of the breadth of forty feet of assize, from the *North* side of the river of *Thames*, to be converted to a key or public and open wharf; and that no lighters, boats or other vessels shall lie before any of the said wharfs or keys between the places aforesaid, on the *North* side of the said river, longer than shall be necessary for the loading or unloading of goods, without the consent and permission of the said wharfingers or proprietors thereof; and that it shall and may be lawful for any person or persons to load or unload any goods or merchandizes at any of the said wharfs or keys; for wharfage and cranage whereof, every proprietor, wharfinger or other persons concerned shall and may demand and receive such rates and no other for the same, as shall from time to time be set out, appointed, assessed and allowed by his majesty with the advice of his privy council; a table of which rates shall be hanged up at every of the said wharfs respectively; his majesty, this day present in council, having considered of the several rates in the schedule hereunto annexed, hath and doth hereby, with the advice of his privy council, assess and allow, set out and appoint the said several and respective rates therein contained, and doth order and appoint that the same shall and may be taken for the wharfage and cranage of all such goods in the said schedule also mentioned as shall at any time hereafter by any person whatsoever be brought unto, shipped off, loaden, or unloaden, AT *Brook's wharf* or key, adjoining to *Queenshithe* in *London*; and that it shall and may be lawful for the present owner or proprietor of the said wharf and his heirs and assigns,

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assigns, lessees, tenants or under-tenants, from time to time and at all times hereafter, to demand of and receive from every person or persons that shall hereafter bring any goods UNTO, ship them off, and load or unload the same at the aforesaid key or wharf, the several rates for crannage and wharfage, which by the aforesaid schedule is appointed to be paid for the same, and no other: and to the intent that all persons concerned may know what they are to pay for the crannage and wharfage of their goods as aforesaid, and not to be imposed upon by the wharfinger, and made to pay more than their just due, it is further ordered that the same be printed and published; and that a copy of the said table and rates shall, according to the directions of the aforesaid act of parliament, be kept constantly hanging up in the most public part and place of the said wharf or key, and another at the custom-house for all persons concerned to resort to and make use of, as they shall have occasion.

That in the schedule annexed to the said order, and thereby referred unto, malt is rated at six pence the score.

That the plaintiffs were, during the time in the declaration mentioned, wharfingers, and possessed of *Brook's* wharf or key abovementioned; and intitled to the said rates.

That the defendants were consignees of a loading of malt, which was brought in a West-country barge; which West-country barge was FASTENED and lay at *Brook's* wharf, and unloaded a SMALL part of the said cargo upon the said wharf; and whilst she lay fastened, the other part of the cargo was taken out and put on board LIGHTERS, and never landed on the wharf.

The question is, "Whether the defendants are liable to pay the wharfingers, according to the rates mentioned in the order of council, for SUCH part of the cargo as was put on board the LIGHTERS and NEVER LANDED ON the wharf."

It was first argued on Friday the 29th of April last, by Mr. Wallace for the plaintiffs, and Mr. Serjeant Burland for the defendants: and, being a question of great consequence and a new one, it was ordered to stand for further argument; which was made on Tuesday last the 7th of this present June, by Mr. Solicitor General (*Norton*) for the plaintiffs, and Mr. Blackstone for the defendants.

THE COUNSEL for the plaintiffs argued that the defendants are liable to pay the duty for those goods which were brought to the wharf, and carried away again elsewhere, without being

being actually landed upon the wharf, where the barge was fastened. For, at common law none could either unload at a wharf, or come to it, and fasten their barge at it, without the consent of its owner: but this statute of 22 C. 2. impowers them to do it without the owner's consent, paying the toll. Therefore the owner of the soil, whose property or at least the dominion of it was taken away by the act, ought to be intitled to all advantages.

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They recited and argued from the 21st, 44th 45th and 46th sections of the act; and insisted that "AT" the wharf must mean something different from "UPON" the wharf: it must include all goods that are brought to the wharf for the purpose of unloading.

The ORDER OF COUNCIL was, they said, a contemporary explanation of the words of the act, and uses equipollent words. And as the act and order put it out of the power of the owner of the wharf to hinder the barge-master from coming to his wharf and fastening the barge there, it is but just that he should receive compensation for it, according to the rate settled by the order of council. And this is certainly reasonable and just; because no other craft can come to the wharf, whilst this barge lies there; and the barge-master has the whole benefit of the wharf, as fully as if the whole cargo was landed UPON it. And the wharfinger is obliged to keep the wharf in repair, as well as servants to attend it.

They cited 2 Ro. Abr. 123. Title, market, fair, B. Stal-
lage pl. 1. "That if a man has a fair, those who have houses
" adjoining to it can not open their shops, to sell goods in
" the fair; but stallage is due for it."

* I find by my
notes of Wigley

v. Peachy et al. Tr. 1732. 5, 6 G. 2. B. R. that Lord Raymond there called this "a monstrous
" case, that a man should pay a toll for opening his windows, and laying goods upon his own
" ground."

By this method, the barge-master may elude the payment of any duty at all: for, he may afterwards land them at a private or a free wharf, or send them on board vessels lying below bridge. This is a fraud, upon the face of it.

Wharfage and cranage are to be understood reddendo singula singulis. Very few goods, or at least, only very heavy goods, require cranage. Here, the duty is payable for wharfage, though there was no cranage.

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If this was an *unloading at the wharf*, (which we say it is,) then they had a *right* to come and stay there, and we had no right to treat them as *fort-seizers*. They might unload the *whole* thus, if they may do so by a *part*.

SHIPS are liable to pay *anchorage*, although they do not *actually* cast anchor.

THE COUNSEL for the defendant, admitted, that the order of council does indeed speak of *all* such goods and merchandizes as shall be brought to any such wharf, but they answered, that *that* is carrying it *further* than the act of parliament *authorizes*; and is therefore of no validity, so far as it *exceeds* the power given by the *act* itself.

THE ACT was professedly made for the *benefit* of the public, and to *restrain* the exactions and unreasonable demands of wharfingers: V. § 21. "*Forasmuch as great exactions &c.*"

THE COMPENSATION is due for the use of the wharf by *landing* the goods *upon* it; and for *that* use of it, *only*. And we have made a compensation to the owner of the soil, in *proportion* to the *use* that we have made of it. When the goods are *landed*, he knows *what* to demand: but he has *no* right to come on board the barge to see what *ELSE* may be in it, *besides* what is so landed.

The *rest* of our goods were *not* UNLOADED AT THE WHARF, within the *meaning* of the 46th section; and, by the 45th section, we could not lie before the wharf *longer* than was necessary.

THIS question must depend upon the *statute itself*, *only*: it is *not* to be resembled to the cases of fairs and markets, which have *no* *similitude* to the present case.

Though the barge-master has a right to come to the wharf, yet if he only comes there *colourably*, or misbehaves there *under that pretence*, or *exceeds* his permission, he shall be considered as *coming thither*, with an *ill intention*; and therefore shall be looked upon as a trespasser *ab initio*. Such a subterfuge would be for the consideration of a jury, in an action of trespass.

If the *unlanded* goods were to be construed liable to the duty, they might pay it *over and over* again; for, they must certainly pay where they are landed at any *other* wharf: or
if

if unloading *over-board* on lighters be an *unloading at the wharf*, it is also a *loading at the wharf*; and then a double duty will be payable. So likewise, if fresh goods should be thus loaded *into the barge, out of lighters*. But it is not pretended that the plaintiffs are intitled to *both*.

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THE COUNSEL for the plaintiffs replied, to the following effect.

THE ORIGINAL RIGHT which was in the *wharfinger*, before the act, is a reason for a *liberal* construction of it.

WITHOUT this act, the barge could not have been fastened to our wharf. They have here unloaded a quantity of goods into lighters, *under the security of our wharf*, and by fastening their barge to it; and it's lying there *hindred other* craft from coming to it.

The *unloading and loading* out of a barge into a lighter is *only one act of unloading the barge*: and there is *only one single duty* due for it. We are intitled to the *same duty* as if it had been landed *on the wharf*. As the defendants have had the *benefit of the wharf*, they ought to *pay the duty*.

And though the wharfinger may have no right to come *on board* the barge, to see what else is in it, besides what is landed at his wharf; yet he may, without going on board it, be able to make his charge upon such goods as are put out of it into lighters that come along-side of it.

THE COURT having taken a few days to consider this case;

Lord MANSFIELD now delivered their resolution.

This is an action for *wharfage and cranage duty*, payable to BROOK's wharf in *London*.

The case stated mentions an order of council, which recites an act of parliament, made upon the rebuilding of the city of *London* after the fire: upon which act of parliament and order of council, the plaintiffs found their claim to this duty.

The question is, "Whether the defendants are liable to pay the duty upon *such part* of the cargo of their barge as was brought to the wharf of the plaintiffs, and *never landed on the wharf*, but only put on board lighters and carried away, WITHOUT being ever actually landed upon the said wharf at all."

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To go by steps—In the first place, it is not contended on the part of the wharfingers, that any meaning is to be put upon the words “All such goods and merchandizes as shall be brought to any such wharf;” unless the goods and merchandizes be actually loaded or unloaded, when they are brought thither.

In the next place, it is agreed that if the vessel that comes to the wharf unloads only *part* of it's lading upon the wharf, and goes forward with the remainder of it's lading, in order to be unloaded elsewhere; the duty is only to be paid for such part as is unloaded there, and not for the remainder which is so carried forwards.

Thirdly—It is not contended, on the part of the wharfingers, that the owner of the vessel or goods is obliged to pay any duty for unloading the goods into lighters on the river, UNLESS he has FASTENED the vessel to the wharf.”

Fourthly—The particular circumstance stated in the present case, is, that “WHILST the vessel was and remained moored and fastened to the wharf, the goods and merchandizes were put on board of lighters brought to lie along-side of her, but NEVER landed on the wharf.”

SOME propositions are so plain and clear in themselves, that nothing can render them more so; and one is therefore under a great deal of difficulty, in what manner to form any argument upon them.

IF ANY duty of wharfage or cranage is payable to the plaintiffs upon these goods thus put on board lighters, it must arise upon this act of parliament; on which alone, their claim to any such duty is founded.

And a duty for WHARFAGE and CRANAGE can not be due where the party has not had the USE of the wharf or the crane. WHARFAGE is due for landing on the wharf; and CRANAGE, for the assistance of the crane. Anchorage or moorage are very different things.

IF any injury has been done to the wharfingers, by lying before their wharf, or by fastening the vessel to it without right, or in any other way whatever, they may have their remedy in another method; but not under this act of parliament, which relates only to wharfage and cranage, and gives the duty for them only.

It

It has been argued, on the part of the wharfingers, that "at the wharf" must bear a different meaning from "upon the wharf"; and that every vessel coming to the wharf and landing *some* of its goods *upon* it, and putting *other* part on board a lighter, is liable to the duty for that *other* part which is only put on board of the lighter.

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But they might as well contend, that a vessel coming and lying before the wharf, *without even mooring or fastening to it*, should be liable to wharfage.

Clearly, the present case was neither within the idea of the *act* of parliament or the *order* of council; nor *would* the legislature have give the *same* duty for *this*, (if they had really meant to give *any*) as they gave for landing the *goods upon* the wharf: they would certainly have given a *smaller* duty for *this alone*; because the duty must still be *paid again*, whatever wharf, they shall *at last* be landed upon. We can not suppose that they will be landed at *private stairs* or *free wharfs*: for, goods consumed in the port of *London* must, in *general* be landed upon some wharf where such goods are *usually* landed; and it must be a *very inconsiderable* proportion that one can imagine to be landed *elsewhere*.

But it is said, "That the owner of the goods or vessel has the *benefit of the wharf* given him by the *act*, even *against the will of the wharfinger*; that the wharfinger can *not hinder* him from coming to it; and *lying at it*, nor even *from mooring and fastening to it*; and that there is no reason why he should receive *all these advantages*, without making *a compensation* to the owner, who is obliged to *repair* and *attend his wharf*."

The answer to this is, That the wharfinger has his *REMEDY* for *all this*, just in the same manner as he had *before the making of the act*; if the vessel should *colourably* come and lie before his wharf, or moor or fasten to it *without intention* of loading or unloading upon it; or if it stays there *longer* than the *act* permits; which expressly prohibits the staying longer (without the consent and permission of the wharfingers) * than is necessary to load and unload. • v. § 45; And this *colourable* coming thither, with an *unfair* intention, must depend upon *circumstances*; and is a *matter of fact*, to be tried by a jury: an *action upon the case* will lie for it; and a jury will consider it in *damages*.

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Another.

BUT if there were, in fact, such *inconveniences* as have been suggested, yet arguments *ab inconvenienti* will not hold against the *express words and meaning* of an *act of parliament*; and both the *words and the meaning* of *this act of parliament* are *extremely plain and clear*. This action seems to be a new experiment, attempted *contrary to its sense and meaning*.

It has been said, on the part of the wharfingers, "That the *order of council* is a *contemporary explanation* of the *act of parliament*."

But the COUNCIL could not *vary or extend* the *act*: they could *only* take it as they *found it*, and *pursue it*. It was not in *their power to impose a duty*.

WE are ALL of US *clear*, that the plaintiffs are *not* intitled to recover the wharfage or cranage duty for *such part* of the goods as were *not unloaded UPON their wharf*. And therefore

A NONSUIT must be entered.

(1 Black. Rep.
428. S. C.)

Tuesday, 14
June 1763.

Validity of the
proviso in a
will, to suspend
the possession of
an unknown te-
nant in tail,
till he shall ar-
rive at the age
of twenty-six.

Lade, Bart. *versus* Holford, Esq; et ux. et al'.

THIS was a case sent hither from the court of *chancery*, for the opinion of *this court*.

Sir *John Lade*, Bart. by his will dated 17th *August* 1739, devised his manors, &c, to four trustees and their heirs; and likewise all his leaseholds and copyholds and personal estate, to be laid out in the purchase of land; UPON TRUST, and to the USE of his cousin JOHN INSKIP, in strict settlement; with divers remainders over, in strict settlement.

In 1740, the testator died.

After his death, *John Inskip* took the surname of LADE. In *February* 1751, he attained his age of 21. In 1756, the said JOHN LADE (afterwards Sir *John Lade*, Baronet,) attained his age of 26; and married *Ann Thrale*. In 1759, he died; leaving his wife *enceinte* of the now plaintiff, Sir *John Lade*, Baronet.

In the will there is a PROVISO "That so often as, and during such time as the person who for the time being (in case the testator had not otherwise directed) would have
" been

1763.

LARDY.
HOLBORN.

" been intitled *in possession* as tenant for life or tenant in tail, " should be *UNDER the age of 26 years*, then the trustees " were to enter, and receive all the rents and profits of the " real, and all the interest and produce of the personal " estate: out of which, they were to allow, for the *main-* " *nance* of such tenant for life or tenant in tail, sums par- " ticularly specified: and all the *rest* was to ACCUMULATE, " and be laid out in the purchase of land, and settled to " and upon the *same* trusts and uses."

On the part of the infant, it was insisted, that he being TENANT IN TAIL, the *proviso* of limitation to the trustees " To take from him the profits of the estate, for the purpose " of accumulation," was contrary to the policy of the law, and therefore VOID.

The defendants, who claimed under limitations in remainder, insisted, it was a *good legal* limitation; and that the *trust* for which it was created, *ought not* to make it void: Therefore, *till* his age of 26, the infant could *only* be allowed, for maintenance, the sums specified in the will.

On the 14th of November 1763, the cause was heard before the Lord Chancellor Henley; who ordered a case to be made for the opinion of the judges of this court, upon the following question, *viz.*

" Whether the defendant *Rose Fuller*, the *heir at law* of " the *survivor* of *Anne Lade*, *John Fuller* the elder, *Hugh Offley*, and *John Fuller* the younger, the trustees named " in the will of the said *Sir John Lade* the testator, did, " upon the birth of the present plaintiff *Sir John Lade* (the " infant,) take ANY and WHAT estate in the premises devised " by virtue of the *proviso* in the said testator's will."

This case was twice argued; first, on *Tuesday* 26th of last *April*, by Mr. Serjeant *Hewitt* for the plaintiffs, and Mr. *De Grey* for the defendants; and now, by Mr. *Marton* for the plaintiffs, and Mr. *Wedderburn* for the defendants.

As it was a *new* case, and the matter of value, the defendants pressed for another argument; and said, counsel of eminence were retained to argue it.

But THE COURT said; the allowance of maintenance was suspended in the mean time, which was a hardship upon the mother; that a third argument would hang it up all the

1763.

LADE v.
HOLBORN.

long vacation. If, in considering the point, they had any doubt, they would order it to be argued again: if they had none, they ought, in justice, to make their certificate directly.

And on the 17th of June, they made the following certificate.

Question—Whether the defendant *Rose Fuller*, the heir at law of the survivor of *Anna Lade*, *John Fuller* the elder, *Hugh Offley*, and *John Fuller* the younger, the trustees named in the will of the said Sir *John Lade* the testator, did, upon the birth of the present plaintiff Sir *John Lade*, take any and what estate in the premises devised, by virtue of the PROVISIO in the will of the said testator.

Having heard counsel on both sides, and considered this case, we are of opinion that *Rose Fuller*, the heir at law of the surviving trustee in the will of Sir *John Lade*, did NOT take ANY estate in the premises devised, by virtue of the PROVISIO in the will of the said testator.

MANSFIELD.

T. DENISON.

E. WILMOT.

17th June 1763.

(1 Black. Rep.
427. S. C.)Tuesday 17
June 1763.

Action lies for
suing out a ma-
licious com-
mission of bank-
rupt, notwith-
standing the
specific remedy
given by stat. 5
G. 2. c. 30.
§ 23.

* Chapman v.
Pickersgill
Mich. 3 Geo. 3.
1762. C. B. 2
Will Rep. 145,
146. seems to
be the case upon
which this writ
of error was
brought.

Brown versus Chapman.

THIS was a writ of error from the *Common Pleas*,^{*} brought upon a judgment for the plaintiff there, in an action upon the case, for falsely and maliciously suing out a commission of bankruptcy against him, to which, the defendant pleaded the general issue; and a verdict was found there, and judgment given for the plaintiff. Upon which judgment, the defendant below brought this writ of error.

Mr. Serjeant *Hewitt*, for the plaintiff in error, objected to the action, and said it did not lie; because the statutes of bankruptcy have provided a particularly remedy: and the thing itself (bankruptcy) did not exist at common law.

If a statute makes a new offence, and prescribes a particular remedy, an indictment will not lie. *Cro. Jac.* 643, 644. pl. 4. *Castle's case*. *Plowd.* 206. a. *Stradling v. Morgan*; on 34, 35 *H. 8. c. 26*. The statute of *Wales* was considered as including a negative. When there is a particular remedy given by

by act of parliament, in a particular case, the act shall not be extended to overthrow and alter the common law, but in those particular cases. 11 Rep. 59. Dr. Foster's case; and Carter 36. *Cornwallis v. Hood*.

1763.

BROWN V.
CHAPMAN.

The bankrupt laws are to be considered as *one system of laws*, or as *one statute*; like those concerning leases of ecclesiastical persons, in 1 Ventr. 246. *Bayly v. Murin*. *Wallis v. Hodson* 24th January 1740, before Lord Hardwicke.

The bankrupt acts are 34, 35 H. 8. c. 4. 13 Eliz. c. 7. 1 Jac. 1. c. 15. and 21 Jac. 1. c. 19. 5 Ann. c. 22. § 7. (the first material act;) 5 G. 1. c. 24. and 5 G. 2. c. 30. § 23. which is professedly calculated to answer the very case of maliciously suing out the commission. It begins "And for preventing the taking out commissions of bankrupts maliciously, be it enacted &c"; and directs a bond in the penalty of 200 l. conditioned to prove the bankruptcy: Which bond is made assignable to the party grieved, who may sue for the penalty.

And the parliament meant their provision to be an *adequate* provision. It would be unpolitic to make the suing out commissions of bankruptcy too dangerous.

LORD MANSFIELD—There is no clause in that act, that takes away the common law remedy; nor that says, "That the party shall not recover more than 200 l. damages."

It can never be for the benefit of trade, that a man should be at liberty to sue out commissions of bankruptcy maliciously.

Mr. Ashburst, *contra*, was beginning to speak: But

THE COURT were so clear, that without hearing him, they ruled the

JUDGMENT to be AFFIRMED.

Woolmer and Another *versus* Muilman.

THIS was a special case reserved, at *nisi prius* at Guildhall, before Lord Mansfield, for the opinion of the court.

It was an action on the case brought for the recovery of a total loss on a *policy of insurance* made on goods and merchandizes on board the ship *Bona Fortuna*, at and from North Bergen

(1 Black Rep. 427. S. C.)

The same day.

False warranty in a policy of insurance, will vitiate it, though the loss happen in a manner not affected by that falsity.

1420

Trinity Term 3 Geo. 3. B. R.

1763

WOOLMER and
Another v.
MUELMAN.

Bergen to any port or places whatsoever, until her safe arrival in *London*.

It was underwritten thus—"Warranted NEUTRAL ship
"and property."

The defendant underwrote the said policy for 150 *l.* on the 23d day of *September* 1762.

The defendant having pleaded the general issue, and paid into court the premium received by him for the said insurance, this cause came on to be tried at *Guildhall, London*, on the 21st day of *May* 1763, before Lord *Mansfield*: When it was admitted that the plaintiffs had interest on board the ship to a large value, to wit, to the amount of the sum insured.

The ship, with the goods and merchandizes so laden and being on board her, after her departure from *North Bergen*, and before her arrival at *London*, proceeding on her voyage, was by the force of winds and stormy weather wrecked, cast away, and sunk in the seas; and the said goods and merchandize were thereby wholly lost.

It was expressly stated, "That the ship or vessel called the "*Bona Fortuna*, at and before the time she was lost, were
"NOT NEUTRAL property, as warranted by the said policy."

The question therefore was, "Whether the plaintiffs can,
"under the circumstances of this case, recover in this
"action."

Mr. *Wallace* was for the plaintiff, and Mr. *Rates* for the defendant. But

Lord MANSEFIELD stopped Mr. *Rates*; and said it was too plain to argue.

This was NO contract: For, the man insured neutral property: And this was not neutral property. Therefore we must give

JUDGMENT for the DEFENDANT.

(1 Black. Rep.
430. S. C.)
Saturday, 18
June 1763.

Rex versus Doctor Harris.

(In the Crown paper—)

Lis pendens is
not a good re-
turn to a man-
damus to swear in churchwardens, though accompanied with very special circumstances.

UPON a MANDAMUS to admit and swear CHURCH-
WARDENS of *St. Olave's, Southwark*.

THE

THE MANDAMUS was directed to DR. HARRIS, commissary of the consistorial and episcopal court of the bishop of *Winchester*, for the parts of *Surrey*; setting forth that *Henry Griffith* and *Thomas Garner* were in *Easter* week then last past duly nominated and elected church-wardens of the parish of *St. Olave, Southwark*, in *Surrey*, to serve for one whole year then next ensuing, according to the ancient usage and custom of the said parish; and that they had often offered themselves to the doctor, to take their corporal oath as church-wardens, and requested to be by him sworn and admitted into the said place and office: which oath the said doctor refuses to administer to them: The writ therefore commands him, without delay to swear and admit, or cause to be sworn and admitted the said *Henry Griffith* and *Thomas Garner* into the said place and office together with all the liberties and privileges thereto belonging and appertaining; or shew cause to the contrary.

A like *mandamus* was also directed to him, to swear and admit *David Griffin*, *Philip Cox*, *Isaac Applebee* and *William Strickland* into the SAME office.

He returned, that there were two causes depending before him, which had been afterwards consolidated into one; in which, it was disputed "WHO were elected church-wardens;" the former, on the promotion of *Griffin*, *Cox*, *Applebee* and *Strickland*, asserting themselves to have been duly elected, and praying to be sworn; the latter, on the promotion of *Griffith* and *Garner* and two others, against *Griffin*, *Cox*, *Applebee* and *Strickland*; and the parties on each side reciprocally denied the others to be duly elected.

By reason whereof he could not, consistently with his duty and the law and practice of the episcopal court, swear or admit or cause to be sworn and admitted the said *Henry Griffith* and *Thomas Garner* into the place or office of church-wardens of the parish of *St. Olave, Southwark*, UNTIL it shall have been judicially determined, in the cause then depending before him, according to allegations given and proofs made thereon, "That the said *Henry Griffith* and *Thomas Garner* WERE DULY ELECTED into such office." All and singular which said things he submitted to the judgment of the court.

The return to the other writ of *mandamus* at the instance of *David Griffin*, *Philip Cox*, *Isaac Applebee*, and *William Strickland*, was the same (*mutatis mutandis*;) only that it added at the end, (after the words "were duly elected into such office,") "by a majority of legal votes."

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REX V.
DR. HARRIS.

Note—Both these causes stood together, in the crown-paper, for argument; and the like rule was made in both: But it was the *former* only that was actually argued; and the fate of *this*, of course, determined the *other*.

Mr. Yates, *pro rege*, argued, that this is a *bad return*. The commissary is only *ministerial*, and is *obliged* to execute the act; whether it be of any validity, or not. The *mandamus* gives *no right*; only a *legal possession*, in order to try it. To prove which, he cited 1 Sir J. S. 609, 610. *Rex v. Simpson*; and 2 Sir J. S. 893, 894, 895, 896. *Rex v. Dr. Ward*.

But this is a question which this very commissary *himself* is to determine: And it does not at all appear *when he will* determine it.

The defendant can bring no action, *till admission*.

* It was Tr.
3, 9 Geo. 3.

A latter case in point is *Rex v. Reynell*, Tr. * 9 G. 2. B. R. Upon a *mandamus* commanding him to swear Lodge church-warden of *Temple Holy Cross* in *Bristol*; he returned, "That in a suit depending in the bishop's court, he himself had decreed in favour of *Whiteburch*; and that an appeal was lodged, and was depending." This return was quashed; and a peremptory *mandamus* awarded.

Mr. Blackstone, for Dr. Harris.—The doctor is totally disinterested. It is his own return, arising from his own difficulties.

LORD MANSFIELD—It is an indecent return. He has no right to try the question: He can not try the legality of the votes. The king's writ commands him to admit and swear: And he must obey it.

Mr. Blackstone, cited 2 *Ld. Raym.* 1008. *The Queen v. Guise*, 3 *Salk.* 88. and 6 *Mod.* 189. (All S. C.) proving (he said) "That *non fuit electus* is a good return;" and likewise "That *special matter* may be returned, in *some cases*."

Here are two *cross mandamuses*: And the doctor does not know *which* to obey.

* They were
the only judges
that were in
court.

LORD MANSFIELD and Mr. Justice WILMOT *—He ought to obey *both*. It is *without prejudice to the right* of either claimant.

Lord

Lord MANSFIELD. But he says, "He will determine it himself."

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Dr. HARRIS.

Mr. Blackstone—In Sir T. Raym. 439. Carpenter's case, the return is very much like this return: and the reporter says—"We granted a writ to swear Carpenter; because the ecclesiastical court can not try the custom of choosing the church-wardens." Which case seems to imply, that though the ecclesiastical judge can not try a custom, yet he may try other matters which the parties have submitted to him.

Lord MANSFIELD—All the cases cited on both sides, prove this return to be wrong. It would be so, even if he could try it; (which he can not do :) he can not try the legality of the votes.

Mr. Justice WILMOT—these writs give no right: and he can not try the legality of the votes.

Per Cur.

The RETURN must be DISALLOWED:

And a PEREMPTORY MANDAMUS go.

THE COURT proposed, and the parties consented, to try the right in a feigned issue: and the execution of the peremptory mandamus to be suspended till after the trial: and then the peremptory mandamus to go, "To swear in the victors at the trial;" unless the judge who tries it, shall declare himself dissatisfied with the verdict.

Combe, Esq; versus Pitt.

THIS was an action of DEBT for 1500*l.* brought by Richard Combe, esq; one of the candidates for member of parliament at the last * election for Ivelchester, against Benjamin Pitt, for unlawfully corrupting three several voters to give their votes for Mr. Lockyer and Lord Percival.

The declaration, was of Michaelmas term 3 G. 3. with a memorandum referring to Saturday next after the morrow of All Souls.

Defendant must shew the other action to be actually prior in point of time.

The

(1 Black. Rep.
437. 523.)

Monday, 20
June 1763.
and Tuesday
21 ditto.

Vide ante

p. 1335.

* V. 2 G. 2.

c. 24. § 7.

Another action
in the same term
cannot be plead-
ed to a popular
action, but de-

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Pitt.

The defendant pleads, *in abatement*, that in this same term of St. Michael, before the king at Westminster came one George Lake and exhibited his bill against the defendant of a plea of debt for 4000 l. for the same cause of action, and for the same identical offences.

The plaintiff replies that after the committing of the said several offences in his bill mentioned, and long before the day of exhibiting the same bill, and also before the day of exhibiting the said George Lake's bill, that is to say, on the 30th day of June 2 G. 3. He the said Richard Combe, for the recovery of his aforesaid debt, sued forth out of the court of our lord the now king before the king himself, a certain writ of our said lord the now king called a LATITAT, against the said Benjamin Pitt, directed to the then sheriff of the county of Surrey, by which said writ our said lord the now king commanded &c. so that he might have his body at Westminster on Saturday next after the morrow of All Souls then next coming, to answer to the said Richard Combe in a plea of trespass, and that the said sheriff should then have there that writ: which said writ he the said Richard Combe sued forth with intent &c. And that the said Benjamin Pitt, afterwards and before the return of the said writ, to wit, on the 29th day of July in the 2d year aforesaid, was in due manner served with the copy of the said writ, according to the form of the statute in such case made and provided; and that he the said Benjamin Pitt afterwards at the return of the said writ, to wit, on Saturday next after the morrow of All Souls now last past, appeared in the said court here to the writ aforesaid &c; and that thereupon the said R. Combe, in this present Michaelmas term, to wit, on the said Saturday next after the morrow of All Souls, according to his intention aforesaid, exhibited his aforesaid bill against the said Benjamin, in form aforesaid, for the recovery of his aforesaid debt above demanded. And this he is ready to verify. Wherefore he prays judgment, and that his said bill may be adjudged good; and that the said Benjamin Pitt may answer over thereto &c.

The defendant rejoins, that after the committing of the said supposed offences in the same bill mentioned, and long before the day of exhibiting the said respective bills of the said Richard Combe and George Lake, that is to say on the said 30th day of June in the 2d year of the reign of our lord the now king, the said G. Lake sued forth out of the court of our lord the king before the king himself (the said court being then and still at Westminster in the county of Middlesex) a certain writ of our said lord the king called a latitat, against him the said

said Benjamin directed to the then sheriff of the county of Surrey, by which said writ our said lord the now king commanded the then said sheriff &c, so that he might have his body before our said lord the king at Westminster on Saturday next after the morrow of All Souls then next coming, to answer to the said George Lake in a plea of trespass, and that the said sheriff should then have there that writ. And that afterwards, and before the return of the said writ, and before the said Benjamin was served with a copy of the said writ so sued out by the said Richard, or had any notice of that writ being sued out or intended to be sued out, to wit, on the 7TH day of July in the 2d year aforesaid, he the said Benjamin was served with a copy of the said writ so sued by the said George Lake, with an English notice at the bottom thereof, according to the form of the statute in such case lately made and provided; and that in obedience to the said writ, he the said Benjamin, according to the course and practice of the said court, at the return of the said writ so sued out by the said George Lake, to wit, on Saturday next after the morrow of All Souls now last past, appeared in the said court here, to the said writ so sued out by the said George Lake; and that thereupon the said G. Lake, in the said term of St. Michael, to wit, on the Saturday next after the morrow of All Souls now last past, exhibited his aforesaid bill against the said Benjamin in form aforesaid, for the recovery of the supposed debt by him demanded as aforesaid. And this the said Benjamin is ready to verify. Wherefore, as before, he prays judgment of the said bill of the said R. Combe, and that the same may be quashed, &c.

The plaintiff surrejoins, that by the course and practice of this court, writs of *latitat* sued out after the end of any term are tested as of the term next preceding the time of their being so sued out: but he avers that the said writ of *latitat* above alledged to have been sued forth out of the said court here by the above-named George Lake, although the same was tested on the 30th day of June aforesaid, in the said 2d year of his present majesty's reign, being the last day of Trinity term in that year, was REALLY AND IN FACT sued forth on the THIRD day of July in the same year, and NOT BEFORE; and that the aforesaid writ of *latitat* which he the said Richard sued forth out of this court as aforesaid, and which was tested on the 30th day of June aforesaid in the said 2d year of his present majesty's reign was REALLY AND IN FACT sued out by the said RICHARD against the said Benjamin for the cause aforesaid, long before the said writ of *latitat* in the aforesaid rejoinder mentioned was really and truly sued out by the said George Lake, that is to say, on the FIRST day of July in the said 2d year of his said majesty's reign, to wit, at Iwelcheſter aforesaid;

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PITT.

said; and that he the said *Richard* afterwards with all convenient speed, to wit, on the day and year in the above replication for that purpose mentioned, did serve a copy of his said writ upon the said *Benjamin Pitt*, and on the appearance of the said *Benjamin* thereto exhibited his aforesaid bill and declared thereupon against the said *Benjamin* for the cause and in the manner aforesaid; and this the said *Richard* is ready to verify. Therefore he prays judgment that his aforesaid bill may be adjudged good, and that the said *Benjamin Pitt* may answer over thereto.

To this surrejoinder the defendant demurs specially; and shews for cause, 1st. That it does not sustain the above replication of the said *Richard*; but it is a departure therefrom, in this, that by the said replication the said *Richard*, in order to maintain a priority of suit, hath pleaded and insisted, "That he sued out a writ of *latitat* in this cause against the said *Benjamin Pitt* on the 30th day of June in the 2d year of the reign of his present majesty;" and yet by his said surrejoinder he hath insisted, "That such writ of *latitat* was sued out at a different time, to wit, on the first day of July in the 2d year aforesaid;" and also for that the said *Richard* hath not traversed or denied the service of the said writ of *latitat* sued out by the said *George Lake* to be before the service of the said writ of *latitat* sued out by the said *Richard*, as he the said *Benjamin* hath by his said rejoinder above alleged; and the said surrejoinder is in other respects improper and insufficient.

The plaintiff joins in demurrer.

Mr. *Dunning* argued it for the defendant.

This is an action (laid in *Somersetshire*) for corrupting voters at the election of members of parliament for *Ivelchester*. The declaration is of *Michaelmas* term, and begins with a memorandum referring to *Saturday* next after the morrow of *All Souls*.

The defendant pleads, in abatement, an action brought for the very same matter and offence, by one *George Lake*, in the same term.

The plaintiff replies, that before the day of exhibiting *Lake's* bill, that is to say, on the 30th of June, he the plaintiff sued out a *LATITAT* against the defendant, returnable on *Saturday* next after the morrow of *All Souls*, and that the defendant was duly served with a copy of it, and appeared &c; and thereupon, the plaintiff exhibited his bill against him &c.

The

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PITT.

The defendant rejoins, that on the said 30th of June, Lake sued out a *latitat* against him, returnable on the same Saturday next after the morrow of *All Souls*; and that before the defendant was served with a copy of the plaintiff's writ, or had any notice of it, to wit, on the 7TH of July, he was served with a copy of LAKE's writ; and that Lake, upon the defendant's appearing at the return of it, exhibited his bill on the Saturday next after the morrow of *All Souls*.

The plaintiff surrejoins, that by the course and practice of this court, *latitats* sued out after the end of a term are tested as of the preceding term: but that Lake's *latitat* was in fact sued out on the THIRD of July and not before; and that his the plaintiff's *latitat* was in fact sued out on the FIRST of July, and with all convenient speed served upon the defendant, and proceeded upon as soon as the defendant appeared to it as aforesaid.

To this surrejoinder we demur, and shew for cause, "That the surrejoinder does not sustain the replication, but is a departure from it;" and "That the plaintiff has not therein traversed or denied the SERVICE of Lake's *latitat* to be PRIOR to the service of his own."

First—Here does not appear SUCH a priority of suit, on the part of the plaintiff, as is necessary to ATTACH THE RIGHT OF ACTION in him: BOTH WRITS are tested on the same day, and returnable on the same day: and BOTH DECLARATIONS are supposed to be of the first day of the term; which is to be taken as only one day.

In *qui tam* informations for the same offence, where both are exhibited upon the same day, there is no precedency of suit, to attach the right of suit in either informer: and therefore the court can give judgment for neither; but both shall be barred.

This is expressly resolved in the case of *Pye v. Cooke*, 14 Jac. 1. reported in *Moore* 864, and *Hobart* 128. And the former report resembles it to the case of two *replevins* by two persons at one time, for one taking: the defendant shall answer neither.

It is true, that in a case of *Hutchinson* against *Thomas*, Tr. 27 Car. 2. as reported in 2 *Lev.* 141. in an information for usury, the memorandum was of *Michaelmas* term, and the defendant pleaded "*Quod ante exhibitionem hujus informationis,*
Vol. III. O "scilicet

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E177.

* N. B. It was
Tr. 16 G. 2.
See the note
just below.

"*scilicet termino sci. Michaelis* (the same term) another person exhibited an information also against him for the same usury, and obtained judgment against him." Upon which, the informer demurred, and had judgment; for, both informations, *as there pleaded*, refer to the *first instant* of the same term: but if another information was exhibited *before*, in the same term, he should have pleaded "That this information was exhibited *such a day* in the term; and that at *another day*, before, in the same term, another information was exhibited, and judgment thereupon obtained." And there is also a case (very ill reported) in 2 Sir J. S. 1169, *Jackson qui tam &c. v. Gissing, Tr.* * 15 G. 2. In debt on the statute of 15 C. 2. c. 8. for selling fat lambs alive, the defendant pleaded, "That in the same term another informed against him, and recovered:" and on demurrer, it was held ill, according to 2 Lev. 141. "*Because he did not set out the days on which each bill was exhibited, that so the court might judge of the priority.*" This is the whole of Sir John Strange's report of the case.

But there is a distinction between pleas in abatement, and pleas in bar. Pleas in bar must shew the priority; because the right of action attaches by the priority: but in pleas in abatement, it is sufficient to shew, "That the two suits were commenced upon the same day."

And it appears by a fuller and more accurate MS. report of the case of *Jackson v. Gissing* (which he read *verbatim*) than that of Sir John Strange's, and which may (as he vouched) be depended upon for its correctness, that this distinction between "Pleas in bar and pleas in abatement was † established in that case."

† It may be going too far, to say, "That this distinc-

tion was established in that case:" but it was taken, or at least hinted at, by *Les Lord Chief Justice, Chepple, and Denison*. And that case was a plea in bar, though it is not directly so expressed by Sir J. S.

N. B. Sir J. S. or rather his editor, has mistaken the year: for it was determined in Tr. 1742. 16 G. 2. not 15 (as he reports it.)

Therefore when both actions are commenced at the same time, each may be pleaded in abatement of the other.

And here, both writs have the same teste and the same return; and both declarations refer to the same day.

We have therefore pleaded in abatement, not "That *Lake's* action was prior to the plaintiff's;" but "That both were commenced at the same time:" in which case, we were not obliged to answer to either.

Their

Their replication indeed alledges "That their *latitat* was
"fued out on the 30th of June." But

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Our rejoinder alledges the *very same thing* concerning our
latitat.

COMES V.

PITT. V.

So that the case is *brought back*, just to what it was *before*,
as to *priority*.

Then they surrejoin "That their's was in fact fued out on
"the *first of July*; and our's, not till the *third*: which gives
them a *priority of two days*."

And I own, that it is now settled "That the *true time* of
"suing out the *latitat* may be shewn, whenever it is material,
"in answer to a plea of the *statute of limitations*, notwith-
"standing the *teste*;" so was the determination in the case of
* *Johnson v. Smith*, P. 33 G. 2. B. R.

V. ante

p. 950 to 968.

And in cases of pleas of *tender*, I admit, likewise, "That
"the *day of the tender* may be shewn."

But *neither of these* cases, (on pleas of the statute of limi-
tation or pleas of tender,) apply to the *present* case; which is
a *penal action* brought by a *popular informer*.

Such a construction was very right in *those* cases; because
it tended to *support solid justice*, and to *prevent a wrong* which
would there have arisen from legal fiction.

But though *remedial laws* are to be construed *liberally*, yet
penal laws are always construed *strictly*. A *common informer*
shall *not* be at liberty to quit the *teste*, and avail himself of
the real time: even *forms* shall not be dispensed with, to aid
popular prosecutors.

In the case of *Culliford v. Blandford*, Pasch. 4 W. & M.
B. R. Carthew. 234. Holt Chief Justice differed from the
other three judges; and took this *distinction* between a *civil*
action and an action for a *penalty* given by a statute, "That
"in the *former* case, the suing out a *latitat* within the time
"and continuing it afterwards, will be sufficient; but in the
"other case, if the party proceeds by bill, he ought to file his
"bill within time, that it may appear so to be upon the re-
"cord itself." The plaintiff indeed had judgment: but af-
terwards a writ of error was brought, in that case.

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COMBE v.
PITT.

• V. ante, p.
1424, 1425.
In the replica-
tion and rejoinder.

It appears upon the pleadings in the present case, * "That
" our writ was served on the 7th of July, and their's was not
" served till the 29th." So that we have three weeks priority of
service: which shall take place of the two days priority of
their pocket-writ, which they only took out, but did not serve.
It would be hard if this pocket-priority should be a ground
for our paying the penalty twice over.

It may perhaps be objected, "That both writs were re-
turnable at the same time."

† This was
expressly said,
both by Lord
Ch. J. Lee, and
by Mr. J. Chap-
man.

They were so. And supposing the return of the writ to
be the commencement of the action, yet † (as it was said in
the case of *Jackson v. Gislign*.) If both are at the same time,
the court can not give priority to either; but either defendant
may plead in abatement.

Secondly—As it appears upon the replication and rejoinder
both, "That the plaintiff had no priority of suit; but that
" both writs were sued out on the very same day, viz. on the
" 30th of June." The plaintiff's surrejoinder is repugnant to
the replication, and a departure from it, in alledging
" That his latitat was in fact sued out on the first of July."
And we have shewn this for a cause of demurrer.

WHERE the time is material, (as in this case it is,) a de-
parture from the time before alledged is a defect in substance.

THIS was solemnly determined in the case of *Cole v. Haw-
kins*, H. 3 G. 1. B. R. 1 Sir J. S. 21.

[Of this case I have a MS. note (taken before my
own time:) and the determination was "That in an
" action upon the case on a parol promise, the time of
" the promise, laid in the declaration, is not material:
" but when the defendant by his plea makes it so, the
" plaintiff may answer the plea, and it shall not be a de-
" parture." The same thing was determined in a later
case, of which I have a note of my own, in Tr. 1,
2 G. 2. *Matthews v. Spicer*, 1 Sir J. S. 106. upon a
tender: and a distinction was taken between the case of
a common assumpsit, where the day is alledged only for
form; and a note, where the day is material, and an es-
sential part of the agreement, from which the plaintiff
can not vary.]

Mr. Yates, contra, for the plaintiff.

The

The material question is, "Whether *our* action, or *Lake's* friendly one, be prior."

It is incumbent on the defendant, to shew that the action he pleads is prior to the plaintiff's.

The case of *Jackson, qui tam, v. Giffing*, shews this; and so does 2 *Hawkins's P. C.* 275. § 63.

And there is NO reason for any distinction between pleas in bar and pleas in abatement: The same reasons equally hold in both cases.

The case of *Johnson v. Smith* proves, that the *true* time of suing out the *latitat* may be shewn by the plaintiff: And we have shewn that both writs were tested on the same day; both returnable on the same day; both declarations on the same day, and that *our's* was IN FACT sued out two days before *Lake's*. And the suing out the process is the commencement of the suit; and is equally so, and with equal effect, in a *qui tam* action by a common informer, as it is upon a plea of the statute of limitations or a plea of tender. This appears by the opinion of the three judges (against Lord Chief J. Holt) in the case of *Culliford qui tam, v. Blanford, Carthew* 233, 234. So that we have the priority of suit, and are guilty of no laches: For, we served it with all convenient speed, and proceeded upon it as soon as the defendant appeared. Consequently, *our's* is not to be called a *pocket-latitat*; nor does their priority of service make any difference in their favour.

If Mr. *Dunning's* argument should prevail, it would be impossible to prevent such collusion between defendants and their friendly prosecutors, as must baffle all *real* prosecutions upon this statute.

Perhaps, if both were commenced upon the *very same* day, one *might* be pleadable to the other.

Secondly. As to the DEPARTURE.

The notion of a DEPARTURE is where a man shews and relies upon another matter differing from and contrary to his former allegation. But here is no repugnancy or departure: For, we adhere to our former allegation, as to the *teste* of the writ, pursuant to the course and practice of the court; and then specify the day when we *really* and in fact sued it out.

1763.

COMBE v.
PITT.

• V. ante,
p. 1428.
† Norton ar-
gued it pro
Quer: Gundry,
pro def.

And this is *no departure*, when it is in answer to the defend-
ant's plea, which has made the time *material*, when it was
not so before.

Mr. Dunning, in reply,

Mr. Yates disputes the distinction which I make between
pleas in *abatement*, and pleas in *bar*. But it is a *just* one:
And I had the report of the case of * *Jackson v. Gifling*,
where it was established, from the † gentleman who argued
that case,

It can not be right or reasonable, that *each* plaintiff should
recover against the defendant, for the very *same* offence: And
yet, *that* is the consequence of Mr. Yates's argument.

He says indeed, "That *Lake* is a *friendly* informer." But
how does that appear? Or *how* can the court take *judicial* no-
tice of that? *Both* informers appear in an *equal* light to the
court: And they will aid *neither* of them.

Secondly—"That this *surrejoinder* is a *departure* from the
"replication," is manifest upon the *face* of it: It is quite re-
pugnant to it.

The *replication* does not say one word about the *teste* of the
latitat: It does not mention the *teste* at all, but only alledges
"That it was *sued forth* on the 30th of *June*." The *surre-*
joinder avers it to have been "*sued forth* on the 3d of *July*,
"and not before." Can any thing be more repugnant?

A second argument being proposed,

Lord MANSFIELD said, that it had been extremely
well argued by the gentlemen on both sides; who had both
of them argued like lawyers, and had not said a word too
much or too little.

CUR. ADVIS. till to morrow morning.

And the next day, *Tuesday* the 21st.

Lord MANSFIELD delivered their opinion.

He said it was unnecessary to go into any of the pleadings
subsequent to the plea, if the PLEA *itself* was *bad*: And they
were all of opinion, "That *this plea* is a *bad one*."

It is a plea in *abatement*, shewing "That another action was
"brought against the defendant, in the *same term*, by another
"person,

"person, for the same offence?" And this is all, without any thing more. Whereas he ought to have shewn, "That the RIGHT of action was ATTACHED in some other person, before the present plaintiff's action was commenced." And Mr. Dunning's own two cases prove this doctrine.

1763.

COMM. V. PITT.

THAT of *Hutchinson v. Thomas*, in 2 Lev. 141. was an information for usury. The memorandum was of Michaelmas term. The defendant pleaded "That ante exhibitionem informationis, scilicet the same term, another person exhibited an information also against him for the same usury, and obtained judgment against him." Upon which, the informer demurred, and had judgment: For, both informations, as there pleaded, refer to the first instant of the same term. But if another information was exhibited before, in the same term, the defendant should have pleaded, "That the information pleaded to was exhibited such a DAY of the term; and that at another DAY before, in the same term, another information was exhibited, and judgment thereupon obtained."

And *Jackson, qui tam, v. Gilling*, was a plea, "That in the same term, another informed against him, and recovered." And, on demurrer, it was holden ill, according to 2 Lev. 141. because he did not set out the days on which each bill was exhibited, that so the court might judge of the priority.

Therefore, notwithstanding the general fiction "Of the whole term's being but one day," yet when the priority of action becomes essential and necessary to be ascertained, the particular day MUST be shewn.

Mr. Dunning has fairly stated these two cases, which are against him: But he distinguishes between pleas in BAR, and pleas in ABATEMENT; and he admits these cases, as being pleas in BAR; but says, that where both actions are brought at the same time, it ought to be (as it is here) pleaded in ABATEMENT, and that such a plea in abatement is good. And he has cited a manuscript note of the case of *Jackson v. Gilling*, by which (he says) it appears that * that case really turned upon such a distinction between pleas in bar and pleas in abatement.

BUT there can be NO reason or foundation for such a DISTINCTION: For, in both cases, it is equally necessary to set out the particular day. If the particular day be not specified, the whole term will be considered but as one day.

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PITT.

The case is intelligible, as it is reported by Sir J. S. And my brother *Denison* says, it is * *rightly* taken.

* If it is *rightly* taken, I am sure it is not *fully* taken: at least, I know that my own note of it employs twice as many pages as his does *lines*.

† V. ante,
p. 1431.

A case was cited from *Hobart* and from *Moore*, *Pye v. Coke*, 14 Jac. 1. to prove, that "Where two informations are exhibited on the *same day*, the defendant *needs not to answer either*." And Mr. *Tates* seemed to † concede, "That if both were, in *fact*, brought upon the *very same day*, one *might* be pleaded "to the other."

BUT though the law does not, in *general*, allow of the fraction of a day, yet it admits it in cases where it is *necessary to distinguish*. And I do not see why the *very hour* may not be so too, where it is *necessary* and *can be done*: For, it is not like a mathematical point, which *can not* be divided. However, this is not necessary to be determined in the *present case*.

UPON the *whole*, we think the PLEA *bad*, on the authority of the two cases in *Levinz* and *Strange*: And therefore there is no need to go into any of the subsequent pleadings.

Let the defendant ANSWER OVER.

V. post p. 1586. (under *Monday* 19th November 1764.)

(1 Black. Rep.
410, 439. S.C.)
Wednesday,
22 June 1763.

Information granted for a conspiracy by a smelter, an attorney, and a gentleman, to assign over a female apprentice, by her own consent for the purpose of prostitution.

Rex *versus* Sir Francis-Blake Delaval, William Bates, and John Fraine.

ON shewing cause (in the last term, viz. on *Monday* 16th of *May*) why an *information* or *informations* should not be exhibited against the defendants, for certain *misdemeanors*;

And also upon Sir *Francis's* producing ANNE CATLEY in court, in obedience to an *habeas corpus* directed to him for that purpose;

The charge against them was, That the defendants had joined in an unlawful *combination and conspiracy*, to remove this girl, an infant of about 18, out of the hands of the defendant *Bates* (a musician) to whom she was bound an apprentice by her father (a gentleman's coachman) without the knowledge or approbation of the said *Catley* her father; and to place her in the hands of Sir *Francis*, for the purpose of PROSTITUTION.

For

For which purpose (as it was insisted) she was discharged by BATES, her master, from the indentures of her apprenticeship to him, in consideration of 200 l. (the penalty of them) paid to him by Sir Francis; and was then bound, by the usual indentures of apprenticeship, to SIR FRANCIS: and MR. FRANE was the attorney who was concerned in the transaction, so far as to make all these several indentures, and also to draw up an agreement between Sir Francis and Bates, "That Bates should have the profits of an engagement or contract he had entered into for her singing at Marybone, and be secured against the non-performance of that contract." The girl was now notoriously kept by Sir Francis Delaval; and actually resided in his house, and publicly rode out on his horses, attended by his servants.

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RECY.
SIR FRANCIS
BLAKE DELAVAL
VALLEY
Others.

As to the INFORMATION—

THE COURT adjourned the consideration of the matter till the first day of the present term. For

LORD MANSFIELD said, that if here really has been a CONSPIRACY to seduce this girl, (which is the foot upon which this court are to take it up,) he and his brethren had some doubt "Whether the father and mother were not concerned in it, as well as the rest." Therefore let the rule be enlarged till the first day of next term: and let the father and mother, in the mean time, give an answer to the matters which are charged upon them in the affidavits that have been read on the part of the defendants.

As to the HABEAS CORPUS—

His LORDSHIP said, that the three principal cases that have occurred since queen Anne's time, that are applicable to the present case, were

Mrs. Turberville's case (*Ren v. Clarkson et al.* 1 Sir J. S. 444.) in Trin. 7 G. 1. in this court;

Frances Howland's case (*Ren v. Mary Johnson*, 1 Sir J. S. 579. and 2 Ld. Roym. 1334.) in Hil. 10 G. 1. B. R. And

James Smith's case (*Ren v. Penelope Smith*, 2 Sir J. S. 982.) in Trin. 7, 8 G. 2. B. R.

And

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REX v.
Sir FRANCIS
DARTER DEAN
and
Others

And he thought that what was done by the court, in every one of them, was right: though he did not agree with the sayings that were reported in the books to have been made use of in determining them.

In cases of writs of *habeas corpus* directed to private persons, "To bring up infants," the court is bound, *ex debito justitiæ*, to set the infant free from an improper restraint: but they are not bound to deliver them over to any body, nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them.

There is a privilege *REDEUNDO*; unless the court should see ground to declare the contrary.

In the three particular cases which he had mentioned, all that was actually done, he said, was RIGHT: though he did not agree with all that was said.

In the first of these cases (*Rex v. Clarkson et al*) the infant was a marriageable young lady, who lived with her guardian. A man claimed her as his wife: she denied the marriage. The court could not try the marriage by affidavit: and they could not deliver her to the man as her husband, without allowing the marriage. She chose to remain with her guardian: and the court, upon being informed "That the man had a design to seize her," sent a tipstaff home with her, to protect her.

* My own note (and I was in court and saw her) says "about six."

In the second case (*Rex v. Mary Johnson*), the child was too young to judge for itself: she was not more than 9 or 10, or, as some accounts say, * six years old; but certainly not old enough to exercise any judgment of her own. And there was a legal guardian appointed by the will of her father: and therefore it was right to let the legal guardian take her, as she was too young to judge for herself. The guardian appointed, in that case, by the spiritual court was nothing at all: for they appoint any body guardian in that court; for the mere purpose of appearing.

In the third case (*Rex v. Penelope Smith*), the child wanted but six weeks of fourteen. And that case was determined right, (barring the dictums that were used in it:) for the court were certainly right in refusing to deliver the infant to the father; of whose design in applying for the custody of his child, they had a bad opinion.

The

The true rule is, "That the court are to judge upon the circumstances of the particular case; and to give their directions accordingly."

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REV.
SIR FRANCIS
BLAKE DELA-
VAL AND
OTHERS.

In the present case, there is no reason for the court to deliver her to her father. She has sworn "To have received ill usage from him, before she was at all put out apprentice": and whilst she was with Bates her master, it appears that her father seldom or never came near her, or ever gave her either advice or reprimand. It is even suspicious "Whether the father and mother were not parties to the conspiracy" and "whether the father does not carry on this prosecution in hopes of extorting money from the defendants."

Let the girl therefore be discharged from all restraint, and be at liberty to go where she will.

And whoever shall offer to meddle with her *redeundo*, let them take notice "That they do it at their peril."

But I see no reason, in this case, to send an officer with her, to protect her; upon a mere apprehension or supposition "That any body will behave improperly upon the occasion."

The affidavits of the girl's father and mother having been read yesterday, Lord MANSFIELD took them home to revise and consider them, (together with the rest of the affidavits formerly read,) till this morning: by which affidavits now read, the father seemed to me to have very fully exculpated himself from all suspicion of blame; but the mother was acquainted with the amour between Sir Francis and her daughter, whilst she and her daughter lodged together in or near Covent-Garden, and before her daughter's going to Bath, as well as after her return, though she never acquainted her husband at all with her knowledge or suspicion of it.

Lord MANSFIELD now delivered the opinion of the court.

This is a motion for an information against the defendants for a CONSPIRACY to put this young girl (an apprentice to one of them) into the hands of a gentleman of rank and fortune, for the purpose of prostitution; contrary to decency and morality, and without the knowledge or approbation of her father, who prosecutes them for it, and has now cleared himself of all imputation, and appears to be an innocent and an injured man.

The

1763.

REX v.
SIR FRANCIS
DE LAVAL
and
Others.

The fact, uncontroverted, is this—

A female infant, then about fifteen, was bound apprentice by her father to the defendant BATES, a music-master; the girl appearing to have natural talents for music. The father became bound to the master in the penalty of 200 l. for his daughter's performance of the covenants contained in the indenture. She became eminent for vocal music; and thereby gained a great profit to BATES her master. During her apprenticeship, being then about seventeen, she is debauched by Sir Francis Delaval, whilst she resided in the house of Bates's father; as Bates himself was a single man and no house-keeper. In April last, BATES her master indirectly assigns her to Sir Francis, as much as it was in his power to assign her over: and this is done, plainly and manifestly, for bad purposes. BATES at the same time releases the penalty to the father, but without the father's application or even privity; and receives the 200 l. from Sir Francis, by the hands of his taylor; who is employed to pay it to Bates, and also enters into a bond to BATES, to secure to him the profits arising from the girl's singing this summer at Marybone. And then she is indentured to SIR FRANCIS DELAVAL to learn music of HIM: and she covenants with him, both in the usual covenants of indentures of apprenticeship, and likewise in several others, (as "not to quit even his apartments,") &c. These ARTICLES between the parties are signed by all but the father: and a bond is drawn from him, in the penalty of 200 l. for his daughter's performance of these covenants (which he never executed.) And the girl goes and lives and still does live with Sir Francis, notoriously, as a kept mistress.

THUS she has been played over, by BATES, into his hands, for this purpose. No man can avoid seeing all this; let him wink ever so much.

I remember a cause in the court of chancery, wherein it appeared, that a man had formerly assigned his WIFE over to another man: and Lord Hardwicke directed a prosecution for that transaction, as being notoriously and grossly against public decency and good manners. And so is the present case.

It is true that many offences of the incontinent kind fall properly under the jurisdiction of the ecclesiastical court, and are appropriated to it. But, if you except those appropriated cases, THIS court is the *custos morum* of the people, and has the superintendency of offences *contra bonas mores*: and upon this

this ground, both *Sir Charles Sedley* and *Curl*, who had been guilty of offences against good manners, were prosecuted here.

1763.

Howe, besides this, there is, in the present case, a CONSPIRACY and CONFEDERACY amongst the defendants: which are clearly and indisputably within the proper jurisdiction of this court.

REY V.
Sir FRANCIS
BLAKE DELAVAL
and
Others.

And in the conspiracy they were all three concerned.

BATES, the master, clearly knew of the connexion between *Sir Francis* and his apprentice, in *February*; but he gave no notice at all about it, to her father, till a considerable time after he knew it himself; and at last, neither tells nor hints to him any thing further than that she had been seen riding in the park attended by a servant of *Sir Francis Delaval's*, and that she neglected her business and his instructions; and recommended her mother's taking a lodging for her and lodging with her. In *April*, he enters into this transaction with *Sir Francis*; who is to pay him the penalty of the original indentures, and then to have the girl. Yet of all this, he gives no notice to her father. BATES's own affidavit is highly improbable: and though the girl swears, in her's, to exculpate BATES as well as *Sir Francis Delaval*, yet it is plainly discoverable from what she swears, "That BATES's account is not a true one." BATES therefore ought clearly to be included in the rule for an information.

Then as to *FRAINE*, the attorney—Though I never heard any imputation upon him before, yet in this instance he has certainly acted inconsistently with the duty of his profession and that chastity of character which it is incumbent upon an attorney always to support. He has drawn and prepared all these instruments; and the indentures whereby this girl, already bound to *Bates*, binds herself apprentice to *Sir Francis Delaval*, to be taught music by him; and all the covenants contained in it; and was privy to the compensation that *Bates* received from *Sir Francis*. So that it was impossible for him to be ignorant of the real intention of this transaction: he could not imagine that she really bound herself to *Sir Francis*, to be taught music by him; but must undoubtedly have been conscious of the true purpose for which these deeds and writings were calculated. He therefore ought likewise to be included in the absolute rule for an information.

Then

1440

Trinity Term 3 Geo. 3. B. R.

1763.

Then as to SIR FRANCIS himself, there can remain no doubt.

REX v.
SIR FRANCIS.
BLAKE DELA-
VAL and
Others.

Therefore let the RULE be ABSOLUTE
against ALL * THREE.

* Note—

The counsel for the prosecutor did not, upon the original motion, pray any rule against the *taylor*; suspecting that he had acted rather under a kind of *compulsion*, than ill intention or design.

Same, 22d
June 1763.

Rex *versus* Burbage.

Hab. corp. for a
prisoner in ex-
ecution, *ad*
testif. refused,
the application
appearing to be
a contrivance.

MR. *Asbhurst*, on behalf of the prosecutor, moved for a *habeas corpus ad testificandum*, to carry *Thomas Haydon*, a prisoner in EXECUTION in the King's Bench prison for a *misdemeanor*, down to the next assizes for the county of *Worcester*, against the defendant; upon an affidavit of his being a material witness.

But Lord MANSFIELD, though he agreed, "That (in general) a *habeas corpus ad testificandum* will lie, to remove "a person in execution, to be a witness," yet thought the present application to be a mere contrivance.

† V. ante.
p. 1387. Rex
v. Thomas
Haydon, Sa-
turday 7th May
1763.

This *Burbage* is indicted for perjury in swearing the very oath upon which this † *Thomas Haydon* was convicted of the offence for which he is now imprisoned: so that it seems difficult to account for his being a material witness in the cause. But even admitting him to be so, there is no great inconvenience in trying it at the next following assizes; at which time this man's imprisonment will be at an end.

Per cur.?

TAKE NOTHING BY THE MOTION.

The End of Trinity Term 1763. 3 G. 3.

Death of Mr.
Justice Fos-
TER.

* * Mr. Justice FOSTER was absent all this term; and died on the first day of the following term, viz. Monday the 7th of November 1763.

Michaelmas

Michaelmas Term

4 Geo. 3. B. R. 1763.

In the Evening this Monday the First Day of

this Term, about Nine o'Clock,

* died

Mr. Justice FOSTER,

Third Judge of this Court, aged about 74.

Right on the Demise of Francis Basset, Esq;
versus Thomas and Another.

THIS was a case reserved upon an ejectment tried at the Western summer-circuit in 1761. It turned upon the construction of a power; and the question was, "Whether the power was or was not well executed."

At the assizes, there was a verdict for the plaintiff, subject to the opinion of the court, on the following case.

John Pendarvis Basset, being seised in fee, in consideration of an intended marriage between him and Mrs. Ann Prideaux, conveyed to trustees and their heirs, to the use of himself and his heirs till the marriage; then, of himself for life; remainder to the trustees, to preserve contingent remainders; and after his own death, then remainder to secure a rent-charge to his intended wife for her life; remainder, to the first and other sons of the marriage, in tail male; remainder, to such uses as he should by deed or will appoint; remainder, for want of such appointment, to the heirs of his

Monday, 7 Nov.
1763.

Death of Mr.
Justice Foster.

* Memorandum
—There were
only THREE
judges of this
court during the
whole term.

(1 Black Rep.
446.)

Tuesday 15
Nov. 1763.

Power to make
leases for years,
to be liberally
construed.

1763.

RIGHT ON De-
mise,
BASSET V.
THOMAS and
Another.

his body, in tail male; remainder to his brother *Francis Basset*, the lessor of the plaintiff, for life; remainder to the first and other sons of the said *Francis Basset*, in tail male; remainder to himself, his heirs and assigns for ever: which several estates and limitations aforesaid are subject to a proviso "That it should be lawful for himself and *Francis Basset*, during their respective lives, and the son and sons of their respective bodies, and the heirs male of such son and sons, and his own heirs male, as they should be severally and successively in the possession of the freehold by virtue of the limitations aforesaid; and for the said TRUSTEES and the survivors and survivor of them, and the heirs of such survivor, during the minority of any such son or sons or issue male; at any time or times, by any deed or deeds to be signed and sealed by him or them respectively in the presence of two or more credible witnesses, to demise, lease or grant to any person or persons, either in possession or reversion, for one life, or for two or three lives, or for any number of years determinable on the death of any one, two, or three person or persons to be named in every such lease, all or any part of the said premises which had been USUALLY so demised and letten; so as there should be no more than three lives in being at any one time, of or on any one lease or demise so to be made and granted; and so as upon every such lease or demise so to be made, there should be reserved so much or more yearly rent as then was or had been given or received for the same premises within 20 years then last past; or a proportionable rent, where a greater or lesser part of any farms or tenements, either separately or apart, or together with any other part or parcel of the said premises or other lands, should be demised or be payable quarterly or otherwise; and to continue during the estate and term thereby granted, and to be incident and go along with the reversion and remainder expectant on such leases respectively, with usual covenants on the lessee's part; and so as no such lease should be punishable of waste; and so as in every such lease there should be a condition of re-entry for non-payment of rent, and for waste; and so as every lessee should execute a counterpart of such lease. And it was by the said indenture declared and agreed, that all such leases, grants and setts as should be made by virtue thereof should be good, valid and effectual in the law, to all intents and purposes; and that the respective lessees their executors, &c,—should and might hold and enjoy the several, &c, to them respectively demised, for the respective terms and estate for which such lease should be made."

The marriage was solemnized in 1737.

The

The said *John Pendarves Bassett* died on 19th September 1739, without making any appointment of the premises; leaving his wife enceinte with a son, who was born on 22d May 1740, and was baptized *John Prideaux*, and became intitled to an estate tail in the premises, subject to the said rent-charge to his mother and such other incumbrances as then affected the premises.

1763.

RIGHT on De-
mise,
BASSETT v.
THOMAS and
Another.

By an order of the court of chancery, *Christopher Hawkins*, esq; was appointed receiver, and was empowered to make contracts for leases for one, two, or three life or lives, or years determinable thereon, of all such parts of the said estates as had been usually so granted, and to fill up and renew the lives in the said leases, and to receive the fines payable thereon.

In pursuance of which order, the said Mr. *Hawkins* contracted with *Nicholas Tresidder*, for a lease of four fields &c; parcel of the premises in question, which by the death of *Henry Pendarves* were then fallen into possession; for 99 years, if *Mary* the wife of the said *Nicholas Tresidder*, his son, and *Ann* his daughter, or either of them, should so long live; in consideration of a fine of 175*l.* to be paid as hereinafter mentioned, and the yearly rent of 13*s.* 4*d.* and 13*s.* 4*d.* for a heriot.

Accordingly, by an indenture of lease, bearing date on the 24th June 1742, and made between the surviving trustees in the said settlement on the one part, and the said *Nicholas Tresidder* on the other part, reciting the said proviso and power of leasing in the said settlement contained, and the appointment of Mr. *Hawkins* as abovementioned, and the said contract made by him with the said *Tresidder*, with the approbation of the master, in chancery, the said surviving trustees, in pursuance of the said power, and in consideration of 87*l.* 10*s.* then paid to Mr. *Hawkins* by *Tresidder*, and of 87*l.* 10*s.* more, to be paid in six months, and of the rents and covenants therein aftermentioned, and with the approbation of the said master, demised, leased and granted to the said *Nicholas Tresidder* his executors, administrators and assigns all those four fields, &c; to hold for 99 years, if *Mary* the wife of the said *N. T. Nicholas* his son, and *Ann* his daughter or any of them should so long live; yielding and paying therefore yearly the rent of 13*s.* 4*d.* payable quarterly during the said term, and 13*s.* 4*d.* in lieu of a heriot or farliet at or after the several respective deaths of the said *Mary*, *Nicholas* and *Ann*; and also repairing, &c. And in the said indenture is contained a proviso, that if the 87*l.* 10*s.* should not be paid within the stipulated time; or if the yearly sum of 13*s.*

1763.

RIGHT on De-
mise,
BASSET V.
THOMAS and
Another.

4d. or any other the said reservations and agreements should be behind and unpaid and unperformed in part or in all, one year after the same ought to be paid or performed; or if the said N. T. his executors &c, shall do or suffer any waste on the said premises; then it should be lawful to all and every person or persons who for the time being shall be intitled to the reversion of the said premises, to re-enter and the same to have again as in his and their former right and estate. And the said *Nicholas Trefidder* executed a counterpart of the said lease: and the last mentioned 87*l.* 10*s.* was duly paid at the stipulated time. And N. T. and *Nicholas* his son are still living

On 17th May 1756, the said *John Prideaux Bassett* died an infant under 17, intestate, without issue, and unmarried: whereupon the lessor of the plaintiff, who is remainder-man under the limitations in the settlement and also heir at law to his nephew the said *John Prideaux Bassett*, and heir general to the said *John Pendarves Bassett*, claims the premises in question, by virtue of the said remainder to him limited as aforesaid.

Then the case states, that there were contained in the deed of settlement, several tenements other than the *Barton of Pendarves*, which were enjoyed by the said *John Pendarves Bassett* and his ancestors at and before the said 11th of April 1737, by leasing the same from time to time respectively for terms of 99 years; each of such terms being determinable respectively on the expiration of three lives: and that there were several other tenements in the said deed of settlement likewise contained, which were on the said 11th day of April, and had been before that time, holden of the said *John Pendarves Bassett* and his ancestors to farm by leases at a rack-rent.

Then there are stated several old leases of the *Barton of Pendarves* &c, as far back as Queen *Elizabeth's* time, and reciting others in *H. 8th's* time; some for terms of years, and some for 99 years determinable on three lives, at different rents; and that on 15th September 1631, the fee-simple of the said *Barton of Pendarves* was conveyed to *William Pendarves*; and, by him, afterwards (in 1738) to *Samuel Pendarves*; and in 1738, on the death of *Thomas Pendarves*, came into the possession of the said *John Pendarves Bassett*. And an indenture tripartite is stated, bearing date 15th December 1638, whereby the said *Samuel Pendarves*, in consideration of natural love and fatherly affection to his second son *Thomas Pendarves*, and for his better advancement, livelihood and maintenance, covenanted to stand seised to the use of the said *Samuel*, for life; then, of the said *Thomas Pendarves* his executors

executors &c. for 99 years, if the said *Thomas*, or any woman he should marry, or any issue of his body should so long live; paying yearly unto the heirs and assigns of the said *Samuel* the yearly rent of 4*l.* payable quarterly; with covenants on the part of *Thomas*, "To pay the rent, and repair the premises."

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Right on De-
mise.
BASSET v.
THOMAS and
Others.

It was stated, that the rent reserved on the said lease of the 24th of June 1742, to *Nicholas Tresidder*, is more than a proportionable part of the rent reserved for the whole Barton in the deed of 15th December, 1638.

The said *Francis Basset* demised the premises to the plaintiff; under which demise, the plaintiff entered, and was possessed: and, being so possessed, the defendants entered, and ejected him.

The question submitted to the opinion of the court, was, "Whether the lease bearing date on the 24th of June 1742, and made to the said *Nicholas Tresidder*, be a good and effectual lease, by virtue of the POWER herein before mentioned as part of the deed of settlement made 12th April 1737; and thereupon, "Whether the plaintiff ought to recover."

This case was argued by Mr. *Thurlow*, for the plaintiff; and Mr. *Serjeant Burland* for the defendants.

Mr. *Thurlow* argued, that this lease was not of the kind intended by the power; nor was the usual rent reserved, nor the usual covenants contained on the lessee's part. That the intention of Mr. *John Pendarves Basset* was to continue the estate in his name and blood: and that the trustees had only a naked power, without any interest; and could not deviate from the literal terms of the power. And that the word "usual" can not be satisfied by a single instance, or even by two instances.

Serjeant Burland said, that the only question at the trial was, "Whether a covenant to stand seised could be considered as an evidence of the usual manner of demising." And he argued, "That it might;" and insisted, that a lease may be made by a covenant to stand seised, upon good consideration, as of marriage or blood. A covenant "To stand seised, is a conveyance of the land, since the statute of 27 H. 8. These lands have been usually demised for years, determinable upon lives: and the power is, "To demise for any number of years, determinable upon the death of one two or three persons named." And the present lease is within the terms and intention of the power.

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RIGHT on De-
mise,
BASSET V.
THOMAS and
Another.

THE COURT thought this as plain a case as possibly could be, on the part of the defendant.

Here is an estate settled, on a marriage, in *strict settle-*ment; and a power reserved to the guardians and trustees for infants, "To demise, lease and grant for one two or three
"lives, or for any number of years determinable on three
"lives in being, any part &c, *usually so demised*, and refer-
"ving the *usual rent*."

Now there is no doubt but these lands *had been usually* leased for lives; and the *usual profit* made by *finer*.

But it is objected, "That the last lease was made by "Co-
"venant to stand seised &c."

A covenant "To stand seised," entered into by the owner, is a lease.

But it is said, "That this is by way of provision for a
"younger child."

Answer—This is every day's experience; nothing is so common, as making these leases for the benefit of younger children. And it would be very inconvenient, were it otherwise. For if the trustees were obliged to let the lands at a rack-rent, it might be quite inconsistent with the nature of these estates.

POWERS are derived from equity; and ought, even at law, to be construed equitably. And this is the case of an infant tenant in tail; who shall have all advantages of enjoying his estate.

And these lands have been *usually so demised*, even from the time of *Queen Elizabeth*.

Per CUR. (Lord MANSFIELD and Mr. Justice WILMOT)

JUDGMENT for the DEFENDANTS.

Rea

1763

Rex *versus* Inhabitants of Titchfield.

Saturday, 26
Nov. 1763.

This case is already published in the quarto edition of my
SETTLEMENT CASES, No. 164. page 511.

Jennings *versus* Martin.

Monday, 28
Nov. 1763.

ON Mr. Recorder's motion, a rule was made absolute for
discharging the defendant *on common bail*, for defect of
the plaintiff's *affidavit* to hold him to bail: which was only
"That the defendant was indebted to him in such a sum, as
" *appears* by agreement bearing date such a day."

Affidavit of
debt to hold to
bail, being that
defendant was
indebted, as ap-
pears by agree-
ment, defend-
ant discharged
on common bail.

This was alledged to be a settled fatal objection, and al-
ways allowed; the affidavit *not being positive* as the * act re-
quires it to be,

* 12 G. 1.
c. 29. § 2.

Lord MANSFIELD said, that *if* this was a settled point,
it must be adhered to: but he owned, he was *not* satisfied
with the *reason* of it. For, if the party had sworn positively,
"That the defendant *was indebted to him* in such a sum,"
his *adding* the words of reference would not excuse him from
perjury, if the fact should be untrue.

But Mr. Justice DENISON observed, that vast num-
bers of such affidavits had been held insufficient; and the de-
fendants had always been discharged on common bail, where
the affidavits were only couched in terms of *reference*: for, that
the act of parliament required *positive oath of the debt*; whereas
such affidavits cannot be said to be *positive oaths* of it; being
only expressed in words of *reference to somewhat else*, and not
in terms of *absolute assertion*.

RULE made ABSOLUTE for discharging
the DEFENDANT on common bail.

See before p. 655. *Pomp v. Ludvigson M. 1758.* 32
G. 2. B. R. where this point was fully settled, agree-
ably to Mr. Justice Denison's opinion, though not to Mr.
Justice Foster's. I have there collected all the cases on
this head.*

* V. post 1992. *Barclay et al. v. Hunt, M. 1766.* 7 G. 3.

1763

(1 Black. Rep.
443. S. C.)
Monday 28
Nov. 1763.

Rex *versus* Inhabitants of St. Peter's in Dorchester.

This case is already published, in my SETTLEMENT CASES in quarto, No. 165. page 513.

The same 28
Nov. 1763.

Pullen *versus* White.

Where prisoner
shall be dis-
charged on com-
mon bail; for
want of declar-
ing in due time.

THE question was, "Whether the defendant was or was not intitled to be discharged upon common bail, on 4, 5 *W. & M. c. 21.* and the rules of court made sublequent to it; upon these facts, *viz.*"

The defendant had been arrested by virtue of a writ taken out four days before the end of *Easter* term last, RETURNABLE on the last day of the *then next* (and now last) *Trinity* term. The arrest was within two days of the end of the same *Easter* term, wherein the writ issued. The defendant remained a prisoner in custody of the sheriff till after the end of *Trinity* term following, without being charged with any declaration. And then he applied to a judge, to be discharged upon common bail: but the judge, having some doubt, ordered it to be moved in court.

Accordingly, Mr. Solicitor General (*Norton*) did move the court on behalf of the defendant, and prayed that he might be discharged on common bail; and had a rule to shew cause why he should not be so.

Mr. *Walker* now shewed cause against this rule.

The question depends upon these words of the second clause of 4, 5 *W. & M. c. 21.* ("That if any defendant be taken or charged in custody upon any writ out of the courts at *Westminster*, and detained in prison for want of sureties for his appearance thereto, the plaintiff may, before the end of the NEXT term after such writ or process shall be RETURNABLE, declare against such prisoner &c.") and upon the 6th clause of a rule of this court, made in *Easter* term 5 *W. & M.* ("That if the declaration be not filed before the end of the next term after the writ or process by which the

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"the prisoner was taken or charged in custody is *returnable*;
 "and affidavit made and filed thereof before the end of 20
 "days next after such term, the prisoner shall be discharged
 "on common bail signed by a judge;" together with the
 under mentioned rule of *Tr. 2 G. 1.*

Mr. Solicitor General cited and relied on a case of *Lang v. Murrel, M. 14 G. 2. 1740.* in this court, as a case directly in point for him, and determined unanimously by the court, after solemn discussion and deliberation.

[But *that* was a case where the defendant was *not* in custody of a SHERIFF (as this defendant is,) but of the MARSHAL, (to whom he was committed by virtue of a *habeas corpus* brought by him, to remove himself from C. B. where the plaintiff's action was originally brought;) and the court determined it upon a rule made in *Trin. 2 G. 1. 1716.* "That if a defendant be committed to the marshal, or charged in custody of the marshal; OR charged or committed by virtue of the process of this court, to the custody of any SHERIFF or other officer whatsoever, at the suit of any plaintiff; and shall so remain in custody for two terms; and the plaintiff shall not declare against the defendant within that time; that then such defendant after the end of the second term after SUCH IMPRISONMENT, shall be discharged out of the prison where he shall be detained, on filing common bail signed by one of the justices of this court, without giving notice to the plaintiff or his attorney." In OTHER respects, the case cited was the same with the present: for, *that writ* was taken out in *Easter* term 1740, and was returnable on the last day of *Trinity* term following, (as this is;) and *that defendant* was taken in *Easter* term, (as the present defendant was,) and removed himself by *habeas corpus* before the writ upon which he was taken was returnable. The court, in *that case*, grounded their opinion upon the words of that rule of *Trin. 2 G. 1.* "And shall remain in custody for two terms:" and in virtue of those words they ordered the defendant to be discharged.]

THE COURT were of opinion, in the present case, likewise, that the defendant should be discharged on filing common bail; Lord Mansfield saying, that there was no difference (in *this* respect) between the man's being in the custody of the sheriff, and his being in the custody of the marshal.

1450

Michaelmas Term 4 Geo. 3. B. R.

1763.

PULLEN. v.
WHITE.

ORDERED that the defendant be discharged
out of custody of the sheriff, on filing common
bail.

The End of Michaelmas Term 1763. 4 G. 3.

Memorandum—

There were *only* THREE judges of this Court dur-
ing this whole term.

Hilary

Hilary Term.

4 Geo. 3. B. R. 1764.

Sir JOSEPH YATES, (being appointed a JUDGE of this Court,) went out *Serjeant*, this day.

Sir JOSEPH YATES took his place as JUDGE of this Court.

(1 Black. Rep. 450.)

Monday, 23 Jan. 1764.

Tuesday, 24 Jan. 1764.

Mr. Justice Yates's promotion to the bench.

Harris, *Executor*, versus Jones.

ON a question, "Whether an *executor* should be permitted to discontinue, WITHOUT payment of costs."

Mr. *Ashurst*, for the plaintiff-executor, urged that an executor should not pay costs in any instance excepting one; viz. where he had brought an action as executor, which he might have brought in his own name: for which, he cited Sir J. S. 682. *Portman v. Came*,

(1 Black. Rep. 451. S. C.)

Thursday, 26 Jan. 1764.

Executor on discontinuing his action, shall pay costs, where he has knowingly brought it wrong.

But THE COURT were clear, that the giving an executor leave to discontinue, was a matter of discretion in the court; and that they ought not to give him such leave, in any case where he had knowingly brought his action wrong, unless he would consent to pay costs.*

Whereupon Mr. *Ashurst* agreed to take his rule for leave to discontinue, upon payment of costs.*

* V. post, p. 1584. *Hawes, executrix v. Saunders*, 17 Nov. 1764. B. R.

A RULE was granted ACCORDINGLY.

West

1764

West *versus* Radford.

Notice to plead need not be given within same time that a declaration must be filed.

THE declaration was filed on the last day of the second term after the return of the writ: but the notice to plead was only given a little before the esoin-day of the following term.

The defendant had objected that this was irregular; for that the notice "To plead" ought to have been given before the end of the second term, as well as the declaration filed before that time: and the defendant had obtained a rule to shew cause why the proceedings should not be set aside for irregularity, with costs.

But it was holden to be well enough; Mr. Owen certifying it to be the practice. And

The Court discharged this rule, with costs.

this Court

(1 Black. Rep. 433. S. C.)

Tuesday, 21 Jan. 1764.

This case is already in print, in the quarto edition of my SETTLEMENT-CASES, No. 166. page 516: where it may be seen at large.

(1 Black. Rep. 445, 451. S. C.)

Wednesday, 1 Feb. 1764.

* V. 11 G. 3. c. 4. § 3.

In rule for a mandamus to elect a mayor, a substituting mayor de facto must always be a party.

Rex *versus* Bankes, Esq; et al.

UPON Monday, the last day of last Michaelmas term, Mr. Morton shewed cause against a rule, made upon John Bankes, Esq; lord of the LEET for the burrough manor or lordship of CORFE-CASTLE in the isle of Purbeck in the county of Dorset, and also upon Robert Hann, steward of the said leet, and also upon Henry Bankes, esq; the bailiff of the said leet and burrough, and also upon David Hods the deputy bailiff of the said leet and burrough; and also upon John Bishop, John Wells, George Burgess, Christopher Summers, James Hayward, George Clarke Butler, William Havelland, George Best, John Briggs, Thomas Edmunds, Robert Cole, George Osmond, William Butler, Thomas Osmond, David Ralls, John Stockley, Thomas Cusib, William Norman, Thomas Nor-

man,

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Rex v.
BANKES & al.

man, William Ralls, John Roe, John Roe, jun. Henry Moss, and Robert Beere, the jury summoned and ready to be returned to the said court of the said leet on the 25th day of October last; to shew cause why a writ or writs of MANDAMUS should not issue, directed to them, requiring them the said lord of the burrough and his said steward to hold a court leet in and for the said burrough, manor or lordship of Corfe-Castle; and requiring the said Henry Bankes, or in his absence the said David Hibbs, to return and deliver unto the said COURT-LEET the PANNEL or LIST of the jury by him the said David Hibbs summoned on the 24th day of October last; and requiring him the said Robert Hann, at the said court so to be holden, in the usual manner to swear the said jury; and also requiring them the aforesaid JURORS so impanelled and ready to be returned as aforesaid to be sworn in due form at the said court, and then and there to proceed to the ELECTION of a MAYOR of the said burrough of Corfe-Castle for this present year, and to do every act necessary to be done by them or any of them respectively for that purpose, according to the form of the statute in such case made and provided.

THE CAUSE then shewn by Mr. Morton was not upon the merits: (for which, see the cases of Tintagel, Hil. 8 G. 2. B. R. and Rex v. Newsham et al. common-council-men of Carmarthen, P. 1755, 28 G. 2. B. R.) He only objected to the want of NOTICE to the mayor *de facto*; who ought (he said) to have been made a party to this rule, being in possession of the office already; and ought, in common justice, therefore to be heard in defence of his right, before the issuing of a mandamus to proceed to the election of another in his stead.

And he cited the case of *St. Michel, Rex v. Scawen*, in Michaelmas term 1753. 27 G. 2. [See the rule-book of Monday next after 15 days of St. Martin, 27 G. 2.] Where this matter was settled upon long argument and solemn determination, as he said. [But I doubt of the solemnity of it; because, though I was in court upon that day, I took no note of it. Lord Ch. J. Lee was then absent.]

* Or rather
Rex v. Lord
Arundel of
Wardour, who
was lord of the
manor,

THE COURT were of the same opinion, in the present case; and ordered, that the rule should be amended by inserting the name of Mr. PRICE the mayor *de facto*; and that he should be served with it.

Afterwards, (*viz.* on Saturday last, 28th January,) Mr. Morton, on behalf of the defendants, shewed cause against making the rule absolute.

He

1764

REX v.
BANKES & al.

He insisted (1st.) That this election of the mayor *de facto* was NOT APPARENTLY and CLEARLY such a one as was merely colourable only and void: (2dly.) That if it was, yet the prosecutors would not be intitled to this *special mandamus*, but only to a *general* one.

To prove the 1st. point, "That *only such* an election can be a sufficient foundation for the court's granting a *mandamus*," he cited the abovementioned case of *Tintagel*, H. 8 G. 2. B. R. where *Paskeow Hoskins* and *Robins*, were the contenders for the mayoralty; and *Robins* was the mayor *de facto*; and the other applied for the *mandamus*, which was in that case granted: but the court declared *against* granting such a *mandamus*, if they should conceive the least doubt in the world concerning the lawfulness of the pretended election, and unless it was the *clearest* case, imaginable: and professed, that they would not grant the writ, previous to an information, *but* where it should appear to be a *very clear* case "That there had *not* been a due election." For if there was *any* doubt concerning the lawfulness of the election that was set up, the truth of it ought to be left to be tried in an information in the nature of a *quo warranto*.

Lord MANSFIELD proposed, that the counsel for the defendants should *file their affidavits*; that the prosecutor's counsel might be able to judge, whether, upon the affidavits on both sides compared together, it was a * doubtful election and fit to be tried upon an information in nature of a *quo warranto*; or whether it was a * mere colourable election and clearly void. For, * if the former should prove to be the case, the court ought not to grant a *mandamus*: in the latter case, they ought. But still, he said, this *SPECIAL mandamus*, which confined it to the *very individuals* who were summoned on the 24th of October, was certainly wrong: so that the rule can not be made absolute in its present form.

Whereupon Mr. Morton consented to file his affidavits:

And Mr. Serjeant Davy, who was for the prosecutor, intimated that if he should find it to have been only a *doubtful* or *questionable* election, he would not pursue the rule any further.*

* N. B. In a
Case of Rex v.
Holmes, H. 9

G. 2. B. R. Lord Hardwicke mentioned the case of *Tintagel* as the only case where such a *mandamus* had been granted: and he said, the reason of it was, because it was a *quite clear* case; and the corporation was without a mayor. Otherwise, he said, it would not have been granted.

ADJOURNED,
for a few days.

Four

Four days afterwards—Mr. Serjeant *Davy*, having read over the affidavits filed on the part of the defendants, was content to give up his rule, in case the defendants would not insist upon costs.

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REV.
BANKES & al.

But Mr. *Bankes* not being willing to quit his claim to costs on the rule being discharged, that point was litigated.

The COURT, having heard both sides, thought it reasonable, upon the circumstances disclosed to them, to discharge the rule *without* costs.

RULE DISCHARGED.

Tullet versus Linfield.

Friday 3
Feb. 1764.

UPON Master *Owen's* report concerning the regularity of a judgment, the question was, "Whether a *month's* time to plead, (which had been given to the defendant by a judge's order,) should be understood a *calendar* month, or a *lunar* one."

A month's time to plead, means a lunar month.

The attorney for the plaintiff, understanding it in the latter sense had signed judgment after 4 weeks were expired, but *within the calendar* month: which the defendant complained of as an irregularity; and it was, of course, referred to the Master.

THE COURT were unanimously and clearly of opinion, "That it was to be understood a *lunar* month, or *four* weeks."

They said that in all legal proceedings, a *month* means *four* weeks.

On *quare impeditis* indeed, six months are understood to be six *calendar* months. But that is (as Mr. Justice *Wilmut* observed) because it is manifest by the words of the statute of 13 E. 1. (W. 2.) c. 5. that by six months, *half* a year is there meant. The words are—"If he recovers his presentation within six months, damages shall be given to *half* a year's value only."

And Mr. Justice *DENISON* said, there was a distinction between the *temporal* and the *ecclesiastical* law, in interpreting

1764.

TULLY v.
LANFIALPI

preting this term "month" the former understands it to be lunar; the latter, to be calendar.

Per Cur' unanimously.

RULE DISCHARGED.

Rex versus Justices of the Peace for the City of London.

If justices of peace adjourn their proceedings to a day subsequent to repeal of an act of parliament, their jurisdiction will cease. * P. 346, of this act "for the relief of insolvent debtors."

MR. Dunning, supported by Mr. Attorney General (Norton) moved for a *mandamus* to be directed to the justices, to proceed upon a matter depending before them, upon an application regularly made to them before the repeal of the 46th clause* of the act 1 G. 3. c. 17. by the act of 2 G. 3. c. 2: which application had been duly and in due time made by *John Lawry* against *William Milner*, a debtor in their prison, upon the compulsory clause, in the former act, then subsisting in its full force; and upon such application, all the requisites had been complied with by all the parties concerned; and *Milner* had appeared, and given in a schedule of his effects on oath, and had assigned them over for the benefit of his creditors; but the court of quarter-sessions, in whom jurisdiction was thus properly attached before the repeal of the clause, voluntarily and without necessity or sufficient reason, and without the desire or consent of any of the parties, ADJOURNED the matter till a day which was subsequent to the time when the repeal of the said compulsory clause took place.

They urged, that as the jurisdiction was fully ATTACHED in the justices, whilst the clause subsisted; and as the parties concerned had exactly complied with all requisites; and as the prisoner had sworn to his schedule, and actually assigned his effects for the benefit of his creditors, and thereby divested himself of his all, and rendered himself subject to felony if forsworn; it would be hard upon all the parties, if the repeal should be construed as meant or intended to include this case; but particularly hard upon and exceedingly injurious and cruel to the prisoner, if he should not, after all this, be intitled to his discharge out of prison. Therefore they insisted, that the repeal did not extend to this case, according to the true intention of the legislature. And it would be contrary to law and justice, that the act of a court should work a wrong to the party. The jurisdiction was fully attached in the court of quarter-sessions, upon the appearance of all the parties, on the

the 26th of September, and their complying with all requisites. Then the said sessions adjourned it to the 19th of October; which was still within time; for the repeal takes place only from and after the 19th of November (1761 :) and all the parties then attended, and had done every thing incumbent upon them. But on this 19th of October 1761, the lord mayor declared, that he had promised one *Webster*, an attorney concerned against *Milner*, "That *Milner* should not be discharged that day." Whereupon the court of sessions remanded *Milner*: and then the repeal took place. But as this was the act of the COURT, they ought to proceed to do all subsequent acts, and complete the jurisdiction once attached in them,

But Lord MANSFIELD was very clear, and all the rest of the court concurred with him, "That no jurisdiction now remained in the sessions."

Great inconveniences were found to arise from this compulsory clause. The legislature had the whole affair under their consideration: and they have not thought fit to reserve any jurisdiction to the justices, after the 19th of November 1761. Their words are, "That from and after that day, so much of the former act as relates to creditors compelling prisoners charged in execution to deliver up their estates, and to such prisoners being thereupon discharged, shall be and the same is hereby REPEALED to all intents and purposes whatsoever."

And it is plain, that they doubted "Whether those words would not have extended so far as to render the prisoner free from a prosecution for any perjury committed upon that clause; prior to the repeal:" for they add an express proviso, "That this act shall NOT extend or be construed to extend to pardon, indemnify or discharge any person who hath incurred, or before the said 19th day of November 1761 shall incur, any penalty or forfeiture by committing any offence against the said act of the first year of his present majesty's reign; but that every such offender shall be liable to the forfeitures and penalties incurred, or before the said 19th of November 1761 to be incurred, under the said act, as if the said act had not been repealed, and had continued in full force."

Therefore, whatever may be the hardship of this particular case, we have no foundation to support our issuing such a mandamus as is prayed.

NOTHING taken by the MOTION.

Rex

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(1 Black. Rep.
454. S. C.)
Monday 6
Feb. 1764.

Rex versus Inhabitants of Winterbourn.

This case is already printed and published in the quarto edition of my *SETTLEMENT CASES*, No. 167. page 520, 521. But there is a small error, in saying, "That Mr. Selwyn and Mr. Vernon had obtained the rule?" It should be, "Mr. Selwyn and Sir Fletcher Norton."

Saturday, 11
Feb. 1764.

Rex versus Inhabitants of St. Andrew's Holbourn and St. George the Martyr.

Justices, upon
appeal from a
rate to the
quarter sessions,
cannot make a
new, but only
quash the sub-
sisting rate.

ON Friday 11th November 1763, Mr. Solicitor General (Norton) moved for a *certiorari*, to be directed to the justices of peace for the county of *Middlesex*, to remove into this court an order of sessions, made by them at their last *Hicks's-Hall* sessions, quashing a scavenger's rate, and making a new one. And he prayed this *certiorari*, notwithstanding the clause in the act of 2 *W. & M. A. 2. c. 8. § 12*, which says, "That persons aggrieved may have recourse to the general quarter-sessions of the peace to be holden for the place wherein the matter of grievance doth arise: and that their determination and order therein shall be FINAL, without any appeal to ANY other court whatsoever." And, to justify his application for it, he cited *Rex v. The Inhabitants of St. Leonard's Shoreditch*, Tr. 11 G. 1. B. R. [reported in 1 Sir J. S. 630.] And also a case between St. John's parish and St. James's Clerkenwell; (without mentioning when it was determined, or where to be found.)

A rule was then made to shew cause:

And on the 21st of the same month, that rule was made absolute (without defence.)

The order, being accordingly now removed hither by *certiorari*, appeared to be an order made by the justices of peace for the county of *Middlesex*, at a general quarter-session of the peace holden by adjournment at *Hicks's-Hall* upon the 18th of October in the third year of king George the Third, upon the appeal of several of the inhabitants and householders of the parishes of St. Andrew Holbourn, above the bars, and St. George the Martyr, against a SCAVENGER'S rate made upon the inhabitants of the said parishes for the year 1763, according

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GEORGE the
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according to a pound-rate at *four* pence in the pound, and confirmed by two justices of peace for the said county; which appeal set forth, "That the said rate or assessment of *four* pence in the pound was too high, and that a rate of *three* pence in the pound, together with the surplus in hand, would raise a sufficient sum; and that the imposing a higher rate was therefore prejudicial to the appellants, and illegal, and that they were thereby aggrieved." On hearing which appeal, and counsel on both sides, and examining witnesses on oath, and duly considering all circumstances, the court of sessions *quash* the said rate of assessment, and thereupon make, settle, impose and set a NEW rate or assessment according to a pound rate at *three* pence in the pound for the said year, upon the inhabitants of the said parishes; and appoint, empower and require the scavengers to demand, gather and collect such NEW rate or assessment of and from all and every the said inhabitants of the said parishes, in the manner therein particularly expressed.

The exception taken to this order, by Sir *Fletcher Norton*, now Attorney-General, and Mr. *Coxe*, was, "That the justices at the quarter-sessions have exceeded their jurisdiction, in taking upon themselves to make a NEW rate;" whereas they have no power to do any thing more than to *quash* that which was appealed from, if they should find that the appellants were really aggrieved by it.

Mr. *Stowe*, on the other side, endeavoured to support the order of sessions, by comparing it to the case of an appeal from a *poor's* rate, upon which, the justices at sessions have it in their discretion (as he alledged) either to make a new rate themselves at sessions, or to remand it to the church-wardens and overseers for them to make a new one: in proof of which assertion, he cited the case of the parish of *St. Leonard, Shoreditch*, in 2 *Salk.* 483. in point.

And he observed and urged, that by the 12th section of 2 *W. & M. st.* 2. c. 8. the justices in their quarter-sessions are empowered to hear and determine all matters to them complained of; and their determination and order therein is made FINAL.

However, if *this part* of their order which settles a new rate should be esteemed going a step further than their jurisdiction extends, yet their order is at least good so far as relates to the QUASHING of the former rate.

But Mr. Attorney-General and Mr. *Coxe* replied, that a *poor's* rate differed very much from a *scavenger's* rate: for, the

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former is by the 43 *Eliz. c. 2.* to be made by the church-wardens and overseers; the latter, by the before-mentioned act 2 *W. & M. c. 8. § 10.* is directed to be made and settled by the constables, church-wardens and overseers and surveyors of the highways, and such other ancient INHABITANTS as according to custom are usually present at the election of parish-officers, or the greater number of them present.

They alledged also, that the case of *St. Leonard's Shore-ditch*, in *Salk. 483.* had been always complained of; and is referred to and expressly contradicted by the 17 *G. 2. c. 38. § 6.*

Besides, the quarter-sessions have power given them by 43 *Eliz. c. 2.* "To take such order, upon an appeal from a poor's rate, as to them shall be thought convenient: and the same is to conclude all the parties." [See sect. 6.]

But no such power is given to them by this statute of 2 *W. & M. c. 8.* Even the 12th section of it only impowers them "to hear and determine all matters to them complained of," concerning grievances by such scavenger's rates &c: and such their determinations and orders are to be "final and without appeal." But in the present case they have gone beyond their boundary; and have themselves made a NEW rate, which they had no pretence of authority to make; for, it is to be made by the parish officers and the body of the inhabitants, who are charged with the payment of it: whereas this new rate of theirs, would, upon the supposition of it's being a good one, finally and without appeal bind all the inhabitants, without their being even consulted in it.

THIS order is therefore a bad one, and must be quashed in toto, and not for the latter part only. And there is no harm in this: for, if there be an overplus, it will go in aid of the next year's expence. But, on the other hand, if the old rate was to be vacated, after the scavengers have made their contracts for the whole year under it; that might be attended with great inconvenience.

THE COURT, being perfectly satisfied by what had been urged by Mr. Attorney General and Mr. Cox, were clear in their opinion, "That the justices at their quarter-sessions had no power to MAKE this NEW rate;" and quashed their order in toto.

ORDER of SESSIONS QUASHED in toto.

Rex

Rex versus Lyon.

Monday, 13
Feb. 1764.

ON Thursday last (the 9th instant,) Mr. Clayton, on behalf of the prosecutor, shewed cause why the recognizance of the bail should not be discharged *.

If costs have incurred in the course of the proceeding, bail cannot get their recognizance discharged, without payment of them.

The case was this—LYON was indicted at *Hicks's-Hall*, for perjury; and removed the indictment hither by *certiorari*; previous to the issuing whereof, he entered into recognizance with two sureties, as usual, "To appear and plead in the next term, and to give notice of trial, and go to trial in or at the sittings after such next term, unless the court shall otherwise direct;" which condition this man was so far from performing, that he neither gave notice of trial, nor went to trial either in or at the sittings after the then next term; and, in the subsequent term, though he did then indeed give notice of trial, yet, instead of going to trial, he withdrew his record: so that this recognizance was clearly and indisputably become FORFEITED; and was agreed by Mr. Stowe, of counsel for the bail, to be so. But after this, the prosecutor had moved for costs against the defendant Lyon, for not going on to trial after he had given notice that he would do so: which costs had been actually taxed, and then regularly and duly demanded of Lyon; and upon non-payment of them by him, the prosecutor had obtained and executed an attachment against him; and he was now in CUSTODY upon this attachment for his contempt in not paying them.

* V. ante,
p. 10.

But, with regard to the merits of the prosecution, the defendant had given notice of trial in the following term, and went to trial according to such notice; and was ACQUITTED.

Mr. Stowe, on behalf of the bail, insisted that the prosecutor could have but one satisfaction for these costs; tho' he might have either required them of the bail, or taken the principal in execution: but having made his election to proceed against the person of the principal, and gotten his body in execution, he was not afterwards still at liberty to proceed against the bail; who remained no longer liable, after such election made by the prosecutor, to proceed against the person of the principal; notwithstanding the recognizance being (as he confessed it was) actually forfeited.

Mr. Clayton very strongly urged, that, as the recognizance was acknowledged to be actually forfeited, the bail ought not, in point of law or reason, to be discharged from it, till these costs,

Q²

which

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which were solely owing to their principal's own wilful default, should be paid to the prosecutor.

THE COURT, as then advised, were inclined to think that the prosecutor, having made his election to proceed against the person of the principal, and having taken his body in execution, could not, after that, take further remedy against the bail.

However, they gave Mr. Clayton a day or two, to look into it.

ADJOURNED.

Mr. Clayton, now, again insisted, that the recognizance ought not to be discharged, till the prosecutor be paid the costs which he incurred by the defendant's not proceeding to trial according to his notice.

And he urged, in particular, that by the statute of 5, 6 W. & M. c. 11. § 3. "If the defendant prosecuting the writ of *certiorari* be convicted of the offence for which he was indicted, the court shall give reasonable costs to the prosecutor &c; which costs shall be taxed according to the course of the court: and the prosecutor, for the recovery of such costs, shall within ten days after demand made of the defendant, and refusal of payment, on oath, have an attachment granted against the defendant, by the said court, for such his contempt; and the said recognizance shall NOT be DISCHARGED, TILL the costs so taxed shall be PAID."

Therefore this recognizance ought not, he said, to be discharged till these costs should be paid.

Mr. Stowe, for the bail, alledged that this act of parliament, made "To prevent delays of proceedings at the quarter-sessions of the PEACE," relates only to quarter-sessions, not to indictments for perjury found at HICKS'S HALL; which is before the justices as justices of OYER AND TERMINER*.

* And so it was determined in Sidney's case, Rex v. Sidney P. 15 G. 2. 1742. B. R.

Besides, this clause, now insisted upon by Mr. Clayton, begins thus—"If the defendant prosecuting such writ of *certiorari* be CONVICTED of the offence for which he was indicted, then the said court of King's Bench shall give reasonable costs to the prosecutor, if he be the party injured, or a justice &c, or other civil officer prosecuting as an officer:" whereas this defendant was not convicted, but, on the contrary, was acquitted.

More-

Moreover, the costs at present in question are not costs within the act of parliament, even if the defendant had been convicted: these are costs for not going on to trial; and the attachment and execution are all exclusive of this act of parliament, and not within the terms or meaning of the recognizance.

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But THE COURT held, that as the recognizance was actually forfeited; and the prosecutor had had costs taxed to him for the defendant's neglecting to go on to trial; and as he had received no satisfaction for these costs, (for the man's body being in custody is no real satisfaction to him for the costs;) there was no reason for their discharging the recognizance; for there is no pretence for persons to apply for a favour, without first doing justice.

Wherefore

Per CUR.—The RULE “To shew cause
“ why the recognizance should not
“ be discharged,” was itself DIS-
CHARGED.

Rex versus Sir Edward Simpson.

ON Friday last (the 10th instant) DR. COLLIER, in consequence of a rule of “Leave for a civilian to attend,” shewed cause against a rule made upon the judge of the prerogative court of the archbishop of Canterbury, to shew cause why a writ of MANDAMUS should not issue, directed to him, requiring him “To ADMIT of the RETRACTATION of Edmund Browne, one of the executors named in the last will and testament of Sarah Elizabeth Angelica Latour widow deceased, of his RENUNCIATION of the said will; and to grant a probate thereof with the codicils annexed, to the said Edmund Browne and Anne Layton, being the surviving executors named in the said will.”

(1 Black. Rep.
456. S. C.)
Monday, 13
Feb. 1764.

Whether an executor who has formally renounced, can afterwards retract before probate to his co-executor.

The doctor stated the facts to have been as follows—

The testatrix by her will made three executors, two of whom were his client Anne Layton, and this Edmund Browne: which Edmund Browne was also a legatee in the will, and a witness to it; and so also was Mrs. Long, whom this Edmund Browne afterwards married. There were several caveats entered, and many litigations about the probate, and likewise about the validity of this will and the codicils to it; in the course

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course of which litigations, this *Browne* was two or three times examined as a witness to prove it: and, in order to render him a good and unexceptionable *witness to prove* the will, he had no less than *three times* formerly RENOUNCED the *executorship*, as well as released his and his wife's legacies under the will.

There were several *sentences* in the prerogative court in favour of the will and codicils; and *affirmations* of them by the delegates upon appeal; and the cause *remitted* to the prerogative judge: and at length, after several caveats, sentences and appeals, the *delegates* had decreed "That probate should be immediately granted to the said *Anne Layton*, under seal:" and the judge of the prerogative court, being ready to give his opinion (after the last litigation of all) was served with the present rule; against which, the doctor now came to shew cause. (So that, in fact, *no probate* under seal was yet ACTUALLY granted.)

The doctor insisted that the judge of the prerogative court was, after this decree of the delegates, *merely ministerial*, and had nothing to do but to carry the *sentence* of the delegates into execution.

He asserted, that by the ecclesiastical law and by the practice of the ecclesiastical courts, 'tis the constant and established rule "NEVER to allow a *retraction* of a *renunciation* made UPON OATH:" which the renunciation at present in question was. He has sworn "That he has not intermeddled NOR WILL intermeddle with the effects of the testatrix; but renounces all right of execution of the will: So help him God." This the doctor alledged to be the settled form of the oath: and *this oath* this man took; and is consequently bound to keep. It would be totally against good conscience, to dispense with this oath, in any case but where a man has been drawn into it by fraud and imposition.

He insisted that by both *canon* and *civil* law, it was *irretractable*.

By the *canon* law, a renunciation *sponte facta* *devests* the right. (To prove which point, he cited the decretals and *Linwood*.)

By the *civil* law, any renunciation shall bind.

And he declared, that he had examined their books, and could not find any instance of a *retraction* of a renunciation upon oath.

Where an executor does *not* renounce, but reserves a power to come in and prove; *there* indeed he may come in at any time.

He

He mentioned likewise a common-law case, *Broker v. Charter*, in *C. B. Cro. Eliz.* 92: to prove "That *qui semel repudiaverit*, shall not be afterwards executor." There the renunciation was only by letter; whereas in the present case, it was upon oath.

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He acknowledged, that in a case of *Hayward and Day*, a retraction of a renunciation was suffered: but that, he said, was upon the foot of fraud and imposition; which he allowed to be a cause sufficient.

Mr. Leigh, on the same side, (*viz.* for Mrs. Layton, and against the *mandamus*;) cited *Hensloe's* case, 9 Co. 37, 38. and *Hardress* 111. *Pawlett v. Freak*: which shews that by our law, if one of several executors proves the will, this makes them all executors, even though the rest refuse. Therefore (he said) a joint-probate would not at all alter the law: it will still be exactly the same, as upon this single probate. Why then should this court oblige the spiritual judge, who ought not, by their law, to grant it after renunciation, to violate the rules of his court, to NO purpose?

Besides, it may be attended with mischievous consequences: for the grant of probate to this *Edmund Browne* will invalidate his and his wife's testimony given in evidence to prove the will; which may be overturned, perhaps, upon some future contest about it. And many other inconveniences may attend it.

Mr. Attorney General (*Norton*) contra, enforced the rule for a *mandamus*, by arguing to the following effect.

Here is no probate at all, yet granted to any body. Therefore the only question is "Whether a renouncing executor has a right to come in and demand probate, at any time BEFORE probate is at all granted to any one."

This question is not to be governed by the canon or civil, but by the common law.

And by the common law, an executor who has renounced, has yet a right to come in and demand probate, whenever he pleases, notwithstanding such his renunciation.

9 Co. 36. *b.* *Hensloe's* case, is most explicitly so. [V. p. 37, 38, of that case.]

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Dyer 160. b. pl. 42. *Brooke* Ch. J. admits it.

Hardress 111. *Pawlet v. Freak* in point.

The same doctrine is laid down by the lord chancellor, in 3 *Peere Williams* 249. *Robinson v. Pett*, in chancery, before lord Talbot 1734. [P. 251, of that case.]

Agreeable to which, is the case at a court of delegates, reported in 1 *Salk.* 311. *House and Downs v. Lord Petre*: (by which case it appears that the common law courts and the spiritual totally differ on this point; the civilians, contrary to the opinion of the common lawyers, holding a renunciation to be peremptory.)

The temporal courts formerly had, and many of them still have power of granting probate. [See *Hensloe's* case 37 b. 38 a. b.]

The statute of 31 E. 3. c. 11. did indeed put this matter upon a different foot.

But even now, the ecclesiastical courts have only a naked power: AFTER they have done their duty, they have no further power left in them. [See *Hensloe's* case 38 a.]

An executor appointed by a will is to all intents and purposes an executor, as soon as any one of the executors therein named, shall have proved the will.

It is a temporal right: and the jurisdiction of the spiritual court, beyond what is founded upon the statute, is mere usurpation.

The executor is vested with all the property of his testator, before probate: and he can do every thing before probate, but bring an action.

The spiritual court therefore have no business to interfere, to prevent his obtaining probate, which he has a right to have.

The oath upon renunciation is extrajudicial, and was imposed without any right or authority: and the doctor admits that their courts may absolve the party from it, for a good cause; (though, I own, I have no notion of such a power of absolution, if the oath was really binding.)

The *testatrix* has constituted both these persons her executors; and the *spiritual court* has no right to separate them: and in fact, Mrs. Layton is poor, has pawned the effects, and has even been in prison; and we come, before any grant of probate to her, and demand only to be joined with her in it.

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If the matter was doubtful, yet the *mandamus* ought to issue, and the judge of the *spiritual court* be put to make a return to it: and then it will come solemnly before the court, upon record.

To all which, Mr. Attorney added a very material observation, "That both these persons were executors in TRUST only, and had no personal interest in the effects of the *testatrix*."

N. B. The charge of insolvency was returned upon Browne.

LORD MANSFIELD—As neither of these two persons have any interest of their own, in the effects; and each charges the other with insolvency; and here is no counsel at all on behalf of the *cestuys*;—trusts; it would be much the best method, and most agreeable to reason and prudence, that administration should be, by consent of all parties, granted to some third solvent person.

Therefore let the *cestuy-qui-trusts* have notice of this proposal: and let them, as well as Mrs. Layton and Mr. Browne, give their answer to it.

For which purpose, it was then ADJOURNED.

This motion now coming on again, it appeared, that the *Cestuy-qui-trusts* supported Browne; and that though he had no interest of his own, yet he acted on behalf of those who were concerned in interest.

Whereupon the parties came into a

RULE BY CONSENT;

The substance of which was, "That probate should be granted to both; but that Mrs. Layton should not receive any more money nor meddle any more: and Browne was to indemnify her; and to pay her her own legacies, and all such costs as she had been fairly out of pocket."

The End of Hilary Term 1764. 4 G. 3.

Easter

Easter Term

4 Geo. 3. B. R. 1764.

(1 Black. Rep.
460. S. C.)

Thursday, 10
May 1764.

Terms imposed
on prosecutor,
before allowed
to quash his
own indictment.

The King *versus* Philip Carteret Webb, Esq; The Same against the Same.

THE defendant having been *indicted* for perjury, at *Hicks's-Hall*, in *January* last, and that indictment removed into this court by *certiorari*, he pleaded "Not guilty" to it; and the cause was at issue, and a special jury nominated: *after* which, the prosecutor *countermanded* his notice of trial; but the defendant chose to bring it on by *proviso*, and it stood for trial at the first sittings in this term. In the *interim*, viz. at the sessions next preceding this present term, the prosecutor got a *new* indictment found at *Hicks's-Hall*: and yesterday (the first day of this term) the prosecutor's counsel moved for leave to *QUASH* *their own indictment*, being (as they said) *insufficient and defective*; and having, as they conceived, *supplied* those insufficiencies and defects in their *new* indictment; upon which, they declared, that they intended to proceed as fast as they could; but should *not* proceed upon the *old* one, as it would be quite fruitless to do so when they knew it to be defective.

And they cited Sir *William Withipole's* case in *Cro. Car.* 134, 147: and the case of the King against *John Swan* and *Elizabeth Jefferys* in Mr. Justice *Foster's* book of *Crown Law* p. 104.

This motion was opposed by the counsel for the defendant; who endeavoured to represent it as a mere artful scheme to keep up a frivolous prosecution hanging over an innocent man's head, without any real foundation, and with intention to slur his character and credit.

The

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REX v. WARD.

The motion was adjourned to this day: and being now taken up again, and the point discussed, it ended in a rule by consent, that the new indictment should in all respects stand in the place of the old, and all things whatsoever remain in *statu quo*, exactly as if it had been the case of an amendment. The rule was drawn up in these words—"By consent of the defendant in these causes, now present in court; and of Mr. Serjeant Glynn, Mr. Recorder of London, Mr. Stow and Mr. Dunning, counsel for the prosecutors of the two indictments; it is ordered that the first indictment be quashed; and that the second indictment shall be substituted and put in the place of the first; and stand in the same condition, to all intents and purposes whatsoever. And the said counsel for the prosecutors, being called upon to name the prosecutor or prosecutors of the said indictments, declared, that they were authorised by Mr. James Phillips the attorney concerned in carrying on these prosecutions, to say, that John Wilkes late of Great George-street, Westminster, Esq; is the prosecutor of the said two indictments."

"By consent of Mr. Serjeant Glynn, for the prosecutor.
"By consent of Mr. Attorney General, for defendant."

"By the Court."

But THE COURT declared their opinion, that a motion on behalf of a prosecutor; "For leave to quash his own indictment," was by no means a motion of course; more especially after having put the defendant to expence, or having been guilty of unnecessary or affected delay: and Mr. Justice Wilmot cited the case of the *King v. Moore* in 2 Sir J. S. 946, where an indictment for perjury having been removed by *certiorari*, and the defendant having paid costs for not going on to trial, the prosecutor afterwards moved to quash it; which the court refused, unless he would submit to pay costs.

Marder et Ux. versus Lee.

Saturday, 12
May 1764.

UPON the last day of Hilary term last, Mr. Thurlow, on behalf of the plaintiffs, shewed cause against a rule which had been obtained upon the motion of Sir Fletcher Norton, "For the plaintiffs to shew cause why the judgment and writ of *feri facias* executed thereon should not be set aside, with costs; and the sum of 172*l.* 2*s.* 6*d.* levied by the

Judgment entered up by husband and wife upon a warrant given wife while sole, without leave, set aside, but not with costs.

1470

Easter Term 4 Geo. 3. B. R.

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MARDER v.
LEE.

"the sheriff of Devon, be paid to the assignees of the defendant under a commission of bankruptcy issued against him on the 12th day of May last."

The case appeared to be, that LEE the defendant had entered into this warrant of attorney "To confess a judgment to the woman-plaintiff, *dum sola*;" and she afterwards married MARDER the man-plaintiff: after which marriage, the judgment was entered up by the HUSBAND and wife.

The particular dates of these several transactions were as follow—the warrant of attorney "To confess the judgment" bore date in December 1762. The plaintiffs intermarried in February 1763. The judgment was entered up in May 1763. Soon after, the execution was taken out, and executed: and the money levied remains in the hands of the sheriff.

The QUESTION was, "Whether this judgment thus entered up by the HUSBAND and wife, be regular, or not."

Sir Fletcher Norton's objection to it was, that the warrant of attorney did not justify this entry in the name of the HUSBAND and wife. For the warrant is a naked power, not coupled with an interest: which power is determined by the woman's marriage.

But at least, the plaintiffs ought to have applied to the court, and done this under their sanction.

If a warrant be given "To enter up judgment at the suit of two persons;" and one dies; the survivor of them can not enter it up.

Mr. Thurlow, on the contrary, insisted that the judgment was regular,

The warrant "To confess a judgment" is not a naked power; but a power coupled with an interest: and the marriage of the woman to whom it was to be confessed, can be no revocation of it; whatever might have been the case, if she had given such a warrant "To confess judgment to another person," and then married. [* See 1 Shower 91. and 1 Salk. 117. which differ on this head. The former says, "That in such case you may file a bill, and enter judgment against both:" the latter, "That it would be a revocation of her warrant."]

1 Salk. 117. p. 9. H. 1 Ann. B. R. is in point. "A warrant of attorney was given to confess judgment to a feme sole; who

" who afterwards married. The Court gave leave, *notwithstanding the marriage*, to enter judgment; for that the " authority shall not be deemed to be revoked or counter- " manded; because it is for the husband's advantage: like " a grant of a reversion to a feme sole, who marries before " attornment; yet the tenant may attorn afterwards."

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Mr. Justice DENISON thought the marriage to be *no* revocation of *this* authority. He only doubted whether the judgment could be thus entered up, without *leave* of the court.

Mr. Justice WILMOT thought, that the case of the survivor (mentioned by Sir *Fletcher Norton*) almost governed the present case. And he observed, that the better way, in the case now before the court, would have been, to have entered up the judgment, *as before* the marriage.

Lord MANSFIELD thought it would be hard, that this judgment should be set aside; *if* the plaintiffs might, upon a previous application, *have had leave* to enter it up in this manner.

THE RULE was then enlarged, that

THE COURT might advise.*

* V. 12 Mod.
383. Reignolds

v. Davis, S. P. left undetermined. Note; That case is wrong stated in the table of that book. It states, " That the feme sole gave the letter of attorney;" whereas it was given to her

THE COURT now declared their opinion to be, " That the judgment was *irregular*, for want of a previous " *leave of the court* to enter it up." They held, that in order to warrant this entry of the judgment, there ought to have been an *application to the court* for leave to enter it up thus founded upon a proper *affidavit* proving the marriage between the plaintiffs: upon which, a rule of court should have been obtained, giving leave to enter up judgment accordingly. But as this previous step was *not* taken, the judgment was *irregular*, for want of it: the consequence of which was, that the rule must be made absolute. But they did *not* think it reasonable to make the plaintiffs pay costs.

Therefore

Per Cur'.—Let the RULE be ABSOLUTE;

but without costs.

1472

Easter Term 4 Geo. 3. B. R.

1764.

Monday, 14
May 1764.

Only one horse
licence is re-
quired for haw-
kers, pedlars,
and petty chap-
men, travelling
with several
beasts.

* See sect. 1.
and sect. 4.

† N. B. The
error is not in
Dr. Burn, but in
the *act* of parlia-
ment itself. See
Dr. Burn's His-
tory of the Poor

Rex *versus* Robotham.

THIS was a *conviction* upon the HAWKERS AND PED-
LARS act 9, 10 W. 3. c. 27. § 1 and 3. removed into
this court by *certiorari*.

Upon its coming on in the crown-paper, the conviction
was quashed, for a manifest mistake of the justice of peace
who convicted the defendant. For, though the defendant
had a regular licence for travelling *&c.* with a horse (com-
monly termed by those people a HORSE-licence;) yet the justice
had convicted him, because he travelled with *two* horses, and
had not a licence to produce for *EACH* horse with which he so
travelled; (which the statute, as it appears by the printed
statutes, doth not * require.)

On Saturday 11th February last, Mr. Serjeant Hewitt took
the exception; and

Mr. Serjeant Nares owned it to be fatal; but proposed to
refer it to me, to award full satisfaction to the defendant,
both for his costs and damages: for the justice, he said, had
been *drawn into* this, by an † error in Mr. Burn's Justice,
(p. 348. in the third edition in folio;) Title "Hawkers and
"Pedlars;" where the word "*horse*" is (by mistake) put for
"year."

† N. B. The error is not in Dr. Burn, but in the *act* of parliament itself. See Dr. Burn's History of the Poor Laws, with Observations; P. 275. Title "Hawkers and Pedlars."

Lord MANSFIELD supposed it to be only a slip of the
press, rather than a mistake of the author; and desired that
Mr. Burn might have notice of it, in order to set it right in
his next edition.

The conviction was quashed: and a rule of reference to
me made as above proposed.

* Memorandum—Upon my having taken the liberty, this
morning, privately to acquaint the judges, that I had had
the curiosity to search the *parliament-roll*, (on finding the
words of the act to be nonsense, in saying "For each year
"he or she shall so travel with;" and that I had discovered
a blunder in this original act of 9, 10 W. 3. c. 27. in omit-
ting several essential words which ought to have been inserted
therein, and which were inserted in the annual act of the
preceding

preceding year, (namely, "for each horse ass or mule or other beast bearing or drawing burthen he or she shall so travel with;") which mistake manifestly arose from changing the annual duty before given, into a triennial duty, (as may be most clearly seen by comparing the annual act of 8, 9 W. 3. c. 25, § 1. with the triennial one of 9, 10 W. 3. c. 27. § 1.) and that Dr. Burn's book was certainly agreeable to the true intent and meaning of the latter act, whatever it might be to its words; and that the mistake was in the statute itself of 9, 10 W. 3. which gives the duty for three years;—

1764.
Rex v.
ROBOTHAM.

Lord MANSFIELD, Mr. Justice WILMOT, and Mr. Justice YATES (Mr. Justice DENISON not being present) were extremely clear "That the act of parliament was so INTENDED;" and they thought it ought to be so CONSTRUED. And Lord Mansfield desired me to speak to the two serjeants, to come together to the court of king's bench this morning, in order to have the rule set right.

They accordingly came up; and his lordship explained the whole matter to them.

But Mr. Serjeant Nares saying that he had two reasons for giving it up; one, that there was another fatal objection, viz. "That the informer himself was the only witness;" and the other, that he had sent to the hawkers and pedlars office, and was there informed, "That it was their practice" and usage ever since this act of 9, 10 W. 3. to require "only one horse-licence to be taken out for travelling with several beasts of burthen;" and Mr. Wallace also (as *amicus curiæ*) informing the court that the late Lord Hardwicke had (when at the bar) given his opinion "That though the intention of the legislature could not well be doubted, and there certainly was a mistake in the act of parliament; yet, as it is worded, the commissioners could NOT OBLIGE a hawker and pedlar to take out more than one horse-licence for travelling with several beasts of burthen;" and that, accordingly, the commissioners never required more than one single horse-licence for several horses;—

THE COURT declared, that they only desired it might be understood, that nothing had been determined by them upon the construction of this act; and that they should not determine any thing upon it, without hearing the point argued; since the USAGE appeared to have been to require only a single licence for a number of horses.

And

1474

Easter Term 4 Geo. 3. B. R.

1764

REX V.
ROBOTHAM.
MANTON

And Lord MANSFIELD wished that the commissioners of hawkers and pedlars might have notice of what had now passed.

UPON the whole, no alteration was made in the rule of last term; but it stands as it did; *viz.*

"By consent of counsel on both sides, it is further ordered, that it shall be referred to *James Burrow*, Esq; coroner and attorney of this court, to fix and assess what costs and damages the defendant has been put to and has really sustained: and that the sum so to be allowed by the said master for costs and damages, shall be paid by *Francis Turner Blithe*, Esq; the justice of the peace before whom the said defendant was convicted. And it is lastly ordered, that no action shall be brought touching this matter.

Soulby versus Hodgson,

(1 Black. Rep.
463. S. C.)

Tuesday 22
May 1764.

Arbitrators not agreeing in award, choose an umpire, who makes an umpirage, arbitrators joining with him in it does not vitiate.

THIS was an action of debt upon an arbitration-bond. The arbitrators were to choose an umpire, in case they themselves should not agree within a limited time. They did not agree within the limited time; but chose an umpire. The umpire accordingly made an umpirage; and they joined in it.

The only question was, "Whether the umpirage was duly made according to the powers given to the umpire;" or, "Whether it was vitiated and rendered void, by the arbitrators joining in it."

Mr. Wedderburne argued it, for the plaintiff; Mr. Wallace, for the defendant. And Mr. Wallace cited an anonymous case, out of 1 Bulstr. 184. Where *Williams* justice says, "That such an umpirage would be bad." Notwithstanding which,

THE COURT were unanimous and clear, that this was the umpirage of the umpire only. He was at liberty to take what advice, or opinion, or assessors he pleased.

* V. 1 Bulstr. 184. where the umpire joined with the arbitrators, in the original award.

The * case which was cited at the bar is certainly a *mistake*, an error of the reporter. No such thing could be said, as is there reported: at least, there could be no determination founded

founded upon it. It is a distinction in *words*, without any real difference in sense and meaning.

Per Cur'.

JUDGMENT for the PLAINTIFF.

Rex versus Smith.

A CONVICTION of the defendant for trading as a hawker pedlar and petty chapman, *without having a licence*, having been removed by *certiorari* into this court, and now standing in the crown-paper—

Wednesday 23
May 1764.

Conviction for having traded as hawker, pedlar, and petty chapman, without having a licence, good.

Mr. *Harrison* on behalf of the defendant, took this objection to it (amongst others,) *viz.* That the *evidence* which the justice had stated in his conviction, was not sufficient to support his adjudication "That the defendant *HAD no licence.*" The *charge* was "That the man had traded as a hawker pedlar or petty chapman, in selling a piece of *muslin &c.* *without HAVING a licence;*" the *evidence* stated by the justice, in the conviction, is only "That the man *refused to PRODUCE any licence.*" Whereas the trading *WITHOUT HAVING any licence*, and the *refusing to PRODUCE his licence* (in case he really has one,) are quite *DISTINCT offences*; and are so considered by the act of 9, 10 *W. 3. c. 27.* which gives quite distinct and *different penalties* for them, *viz.* 12 *l.* for the former, and 5 *l.* for the latter. *Refusing to produce a licence* which a man *has*, is, in its own nature, a very different thing from *not having one* to produce. And the man's having *CONFESSED* "That he *traded* as a hawker pedlar and "petty chapman," is no ground for convicting him "For "trading as such *without a licence;*" notwithstanding his refusal to *produce* it. And though the 8th section of this act (as well as the act of 3, 4 *Ann. c. 4. § 4.*) gives the same forfeiture for *not producing* as for *not having one*; yet that cannot alter the nature of the offence.

Mr. *Griffith Price* argued on the other side, in support of the conviction. It was founded, he said, on 9, 10 *W. 3. c. 27. § 8.* which authorises and strictly requires the justices of peace, either upon confession of the party offending, or due proofs of witnesses upon oath, "That the person so brought before him had so treated as *aforesaid,*" and that *no such licence shall be PRODUCED* by such offender before the said justice; by warrant under his hand and seal, to cause the said sum of 12 *l.* to be forthwith levied by distress and sale of the offender's goods, &c.

1764.

R. EX V.
SMITH.

The *only* two facts requisite to ground a conviction upon, under this clause, he said, were, 1st. the *trading* in the manner described by the act of parliament; and 2dly. the *refusing* or declining to *produce a licence*. And both these facts are here charged. It is alledged in this conviction, "That he was apprehended for *trading* as a hawker pedlar and petty chapman *without* a licence; and was charged upon oath, before the justice, with having *sold* a piece of muslin &c, as a hawker pedlar and petty chapman: which fact he confessed. That the justice demanded his authority for having done so; and required him to produce his licence: which *he did not produce*. Whereupon the justice convicted him in the penalty of 12*l.* for having traded as *aforsaid without a licence*."

This is all exactly agreeable to *this* clause, (Sect. 8th.)

There is indeed a penalty of 5*l.* given by the *third* clause, for such a trader's refusing to produce his licence to any justice of peace, mayor, constable or other officer of the peace of any *town corporate or burrough where he shall so trade*, demanding it *ex officio*: which penalty of 5*l.* is given to the *poor of the parish where the demand shall be made*; whereas the 12*l.* penalty given by that same third clause is half to the informer, and half to the poor of the parish where the offender shall be *discovered*. But *this* is a conviction upon a charge proved by oath, under a power given to justices of the county or place (in general) where the *offence shall be committed*, pursuant to *another* clause of this act, (Sect. 8.) in the 12*l.* penalty for not having or (which is just the same thing) *not producing any licence*.

Mr. *Harrison*, in reply, denied, that the conviction does pursue the act of parliament: for, he insisted, that *not having any licence*, and *not producing one*, are quite different things; and that the conviction ought to have been "For *not producing one*."

But Lord MANSFIELD said he could see no doubt of this conviction's being a good one upon the 8th clause.

* Mr. J. Denison was not in court.

* Mr. Justice WILMOT declared himself to be clearly of the same opinion.

Upon the whole—(notwithstanding this and some other objections that were taken and over-ruled,)

THE COURT affirmed the conviction:

N. B.

N. B.

Upon comparing the 8th section with the 3d, it is clear, that the 8th section means the 12l. penalty to be for the *same offence*, and to be the very *same penalty* with the 12l. given by the 3d section: and it seems to consider *not producing* to be the same offence and the same thing as *not having*.

1764.

REX V.
SMITH.

Hodson *versus* Richardson.

SEVERAL insurance causes standing upon the same circumstances, it was agreed "That *all* should be bound by the *verdict* given in *one*:" and a verdict was given in that one, for the *plaintiff*. But the defendant gave notice of a motion for a new trial; which he afterwards obtained.

Sir *Fletcher Norton* moved, on behalf of the plaintiff in the *other* causes, that the respective defendants should pay their money to the plaintiff *pursuant to their agreement*; he having obtained a *verdict* in the cause already tried.

But the COURT were clearly and unanimously of opinion, that a consent "To be bound by a *verdict* in one "of many causes upon the same question," means *SUCH* a verdict as the court thinks *ought to stand* as a *final* determination of the matter.

That in the present case, a *material* circumstance was *concealed* from the insurer, by the insured; and therefore the whole contract was *void*: and there ought to be a new trial; and the court had made a rule for that purpose.

NOTHING taken by the MOTION.

Rex *versus* the Inhabitants of Openshaw.

This case is already published in my SETTLEMENT CASES in Quarto, No. 168. p. 522.

(1 Black. Rep.
463, S. C.)

Monday 28
May 1764.

1478

Easter Term 4 Geo. 3. B. R.

1764

Triquet and Others, *versus* Bath.

Peach and Another, *versus* Bath.

(1 Black. Rep.
471, S. C.)

Saturday 2 May
1764.

English secretary
to a foreign mi-
nister, privi-
leged from ar-
rest, tho' for-
merly a trader,
and now under
very suspicious
circumstances.

MR. Blackstone, Mr. Thurlow, and Mr. Dunning, on be-
half of the plaintiffs, shewed cause why the bill of
Middlesex in each of these causes should not be set aside, and
the bail-bond be cancelled.

The rule was made upon affidavits "Of the defendant's
" being a DOMESTIC servant of a foreign minister; and having
" taken all the proper steps to intitle him to the privilege of
" such domestics."

The only question was, "Whether the defendant (*Chris-
pher Bath*) was really and truly and *bonâ fide* a domestic
" servant of Count *Hasslang*, the *Bavarian* minister"; or,
"Whether his service was only colourable, and a mere sham
" and pretence calculated to protect him from the just demands
" of his creditors."

On the part of the defendant, it was sworn, "That he
" was regularly appointed by Count *Hasslang*, to be one of his
" ENGLISH SECRETARIES, at 30 *l.* per ann. for board and
" lodging, &c;" and he swore to actual attendance and actual
service, at several times, at the count's house; and writ-
ting, copying and carrying several letters and memorials:
in short, the defendant's affidavits were so framed, that
every thing was sworn that in absolute strictness could be re-
quired, to bring him within the description of a domestic
servant to this minister.

On the part of the plaintiffs, it appeared, That *Bath* was
a mercer in *Dublin*, about 7 or 8 years ago; that he had af-
terwards been a commissary of stores abroad, and was now
upon half-pay as such, at 15 *s.* per day; that he speaks only
English; that he had never eat nor lodged in the count's house,
nor received any wages: (but as to the wages, it appeared
that there were not yet so much as half a year's wages become
due.) It was also sworn, very generally, "That whilst he
" carried on trade in *Ireland*, he bought goods in *England*,
" and sold them in *Ireland*."

Mr. Blackstone observed that the act of parliament of 7 Ann.
c. 12. was not any alteration of the law from what it was before:
for

for that ambassadors and their attendants were, by the general law of nations, intitled to the same privilege.

The 4th clause (which gives the summary proceeding against the infractors of it,) was added, he said, by the lords, as an amendment; and afterwards agreed to by the commons.

In the like manner, summary remedy was given against the violators of the law of nations with regard to safe conduct, by an old act of 3 H. 6. c. 4, which gave the summary power to the chancellor, calling to him any one judge of either bench.

And he mentioned *Grotius, de jure belli et pacis*; and *Binkersbeck, de foro legatorum, c. 15. de comitibus legatorum*: from both which writers he inferred, that the exclusion of TRADERS from this privilege was agreeable to the law of nations; and that the hanging up the *nomenclatura comitum* was also taken from that law.

He likewise cited several cases in this court, to shew that the NATURE of the service must be specified, and that no one could have a right to claim this privilege, who was not expressly and circumstantially shewn to be fairly, really, and bona fide a domestic servant in the actual service of the foreign minister, and actually performing the service to him, without collusion; and who is not a trader of any sort, or liable to be described as such.

Under the former head, he cited

Widmore v. Alvarez, H. 4 G. 2. B. R. Sir J. S. 797. and *Fitz-Gib. 200. S. C. Poitier v. Croza, Tr. 23 G. 2. B. R. Martin v. Gurdon.* [It was *Holmes v. Gurdon, M. 7 G. 2. B. R.*] and *Britwell v. Carolino.* [It was *Brettel v. Carolino, Tr. 17, 18 G. 2. B. R.* where both points now in question were fully discussed and settled.] He also cited a case of a gardener to a foreign minister who had no garden; and likewise the case of the Reverend Mr. *Shorthose*, who claimed the privilege as chaplain to the Morocco ambassador, a Mahometan; and also a case of *Johnson v. Stewart, M. 1759. 24 G. 2. B. R. S. P.* with the case of *Poitier v. Croza.*

Which cases prove that the NATURE of the service must be PARTICULARLY shewn.

Under the latter head, he cited.

Dodsworth v. Anderson, Sir T. Raym. 375. and *Sir T. Jones 141.* where *Grice*, who bought goods in England and sold them in Ireland, was holden to be a bankrupt in England.

1764.

TRIQUET and
Others v.
BATH.
PEACH and
Another v.
Same.

Which case he would have applied to a fact here sworn on the part of the plaintiffs, viz. "That whilst the defendant was a trader in Ireland, he had bought silk in England, and sold it in Ireland." [But it was not shewn by the plaintiffs, when (in particular) they were bought and sold; or that the goods bought here and sold there, were the same goods; and that the defendant swore, in his affidavit, "That he had not traded since the year 1756."]

Lord MANSFIELD—This privilege of foreign ministers and their domestic servants depends upon the law of NATIONS. The act of parliament of 7 Ann c. 12. is declaratory of it. All that is new in this act, is the clause which gives a summary jurisdiction for the punishment of the infractors of this law.

The act of parliament was made upon occasion of the Czar's ambassador being arrested. If proper application had been immediately made for his discharge from the arrest, the matter might and doubtless would have been set right. Instead of that, bail was put in, before any complaint was made. An information was filed by the then attorney general against the persons who were thus concerned, as infractors of the law of NATIONS: and they were found guilty; but never brought up to judgment.

THE CZAR took the matter up, highly. No punishment would have been thought, by him an adequate reparation, SUCH a sentence as THE COURT could have given, he might have thought a fresh insult.

ANOTHER expedient was fallen upon and agreed to: this act of parliament passed, as an apology and humiliation from the whole nation. It was sent to the CZAR, finely illuminated by an ambassador extraordinary, who made excuses in a solemn oration,

A great deal relative to this transaction and negotiation, appears in the annals of that time; and from a correspondence of the secretary of state there printed,

But the act was not occasioned by any DOUBT "Whether the law of nations, particularly the part relative to public ministers, was not *part of the law of England*; and the infraction, criminal; nor intended to vary, an iota from it.

§ v. post,
p. 2015.
Heathfield v.
Chilton 5th.
Feb. 1767.

† In Canc.

16th July 1736.

I remember in a case before Lord Talbot, of *Buvot v. Bar-*
† upon a motion to discharge the defendant, (who was in execution

execution for not performing a decree,) "*Because* he was "agent of commerce, commissioned by the king of *Prussia*, "and received here as such;" the matter was very elaborately argued at the bar; and a solemn deliberate opinion given by the court. *These* questions arose and were discussed,—"Whether a minister could, by any act or acts, *wave* his "privilege."—"Whether being a *trader* was any objection "against allowing privilege to a minister, personally."—"Whether an *agent of commerce*, or even a *consul*, was intitled "to the privileges of a public minister."—"What was the "rule of decision: the act of parliament; or, the law of "nations." LORD TALBOT declared a clear opinion—"That "the law of nations, in its full extent, was part of the law of "England."—"That the act of parliament was declaratory; "and occasioned by a particular incident."—"That the law "of nations was to be collected from the practice of different "nations, and the authority of *writers*." Accordingly, he argued and determined from such instances, and the authority of *Grotius*, *Barbeyrac*, *Binkershoek*, *Wiquefort*, &c; there being no *English* writer of eminence, upon the subject.

1764.

TRIGRET and
Others v.
BATH.
PEACH and
Another v.
Same.

I was counsel in this case; and have a full note of it.

I remember, too, Lord *Hardwicke*'s declaring his opinion to the same effect; and denying, that Lord Chief Justice *Holt* ever had any doubt as to the law of nations being part of the law of *England*, upon the occasion of the arrest of the *Russian* ambassador.

MR. BLACKSTONE's principles are right: but as to the facts in the present case, the affidavits on the part of the defendant have *out-sworn* those on the part of the plaintiffs. (And his lordship, as well as Mr. Justice *Wilmot*, took notice, that the person who drew the affidavits on the part of the defendant, had very exactly pursued the course of the cases that had been determined upon questions of this kind; and had taken care to meet and answer all objections that might arise from them.) Lord *Mansfield* observed also, that the defendant was employed in the service of Monsieur *Haslang*, before the plaintiff took out his writ.

It was not to be expected, he said, that every particular act of the service should be particularly specified: it is enough, if an actual *bona fide* service be proved. And if such a service be sufficiently proved by affidavit, we must not, upon bare suspicion only, suppose it to have been merely colourable and collusive.

1482

Easter Term 4 Geo. 3. B. R.

1764

TALBOT and
Others v.
BATH.
PEACH and
Another v.
Same.

As to the latter point, "Of his being a *trader*"—his having been so in IRELAND, (and even that seven years ago too) will not bring him within the exception of the 5th clause of this act, which provides "That no merchant or other trader whatsoever, WITHIN the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or public minister, shall have or take any manner of benefit by that act."

* Sir T. Rym.
275. Sir T.
Jones 141.

And there is no colour for bringing this case within that of *Dodsworth v. Anderson*: for here is no connexion between the goods bought in England, and those sold in Ireland. It does not appear that they were the same goods: neither is any time specified, when they were bought, or when they were sold.

Per Cur.—Both RULES were made absolute; but without costs, by reason of the suspicious circumstances of this case.

Saturday, 2.
June 1764.

Cracraft versus Gledowe.

Outlawry cannot be reversed, without giving such bail as the law requires.

UPON Tuesday the 15th of last month, Mr. Eyre, Recorder of London, shewed cause, on behalf of the sheriff of Middlesex, why an attachment should not issue against him, for discharging out of his custody, the defendant in this cause, who had been taken upon a *capias utlagatum*, on his attorney's engaging under his hand, "To appear for the defendant and reverse the outlawry;" WITHOUT taking security by bond in double the sum for which bail was required, pursuant to the act of 4, 5 W. & M. c. 18. § 5, which directs him to do so in all cases where special bail is required by the court.

The cause shewn by the Recorder and Mr. Wallace was, that the sheriff neither did nor could know that it was a case where special bail was required; nor had he any reason to imagine it, as the *capias utlagatum* was not marked for bail: and they produced an affidavit of Mr. Benson who acted as under-sheriff, "That he had no ill intention or thought of collusion; but had acted agreeably to his duty, to the best of his understanding and judgment."

They urged the act of 12 G. 1. c. 29, "To prevent frivolous and vexatious arrests;" which, in it's 2d section, directs, "That if the debt exceeds the sum of ten pounds, there shall be an affidavit of it; and the sum for which bail

"bail is to be taken, shall be *marked* upon the process." So that, unless there be such an affidavit of the debt and *marking of the process*, it is not, as they insisted, a case where special bail is required by the court.

1764

CHACRAFT V.
GLEBOWE.

But if it were a case where special bail is required by the court, how is the sheriff to *know* this, unless the process be marked? It is extremely easy to mark the process: and in the present case, the *exigent* is in fact marked; but the *capias utlagatum* is not. Why did they mark the *one*, and not the *other*? It now appears too, that there was an affidavit filed before the filacer. But the *sheriff* was a stranger to all this: he received the writ of *capias*, *unmarked*. And it cannot be supposed that he was obliged to go and look after the filacer, to procure information. It may be said, "That it would be no great difficulty put upon the sheriff of *Middlesex*, to require this of him." But the case of *all* sheriffs must be under the same rule of determination: and this might as well have been the case of a sheriff of *Cumberland* or *Westmoreland*. And in this case of a *distant* sheriff, is he to appoint an *agent* for this purpose? or is he to trust to the *post*? and is the defendant to lie a week or ten days *in gaol*, till the sheriff can receive information from the filacer?

Mr. *Harvey*, Mr. *Morton*, and Mr. *Stowe*, *contra*, urged on behalf of the plaintiff, that this is a proceeding *by original*, in an action for money lent; and it appears that the plaintiff was intitled to bail upon the *original* process, the cause of action being *expressed* in the writ; and that special bail was required *before* the stat. of 4, 5 *W. & M. c. 18*.

Process of *outlawry* is not within the statute of 12 *G. 1. c. 29*. "To prevent frivolous and vexatious arrests;" and so it was determined in a case in Lord *Hardwicke's* time, *M. 10 G. 2. Fownes v. Allen*, in this court. A *capias utlagatum* is not like an arrest upon *mesne* process; nor is the bond required by 4, 5 *W. & M. c. 18*. like the *alternative* bail upon *mesne* process, (*viz.* "To pay the money, or surrender the principal;") but a bond with one or more sufficient surety or sureties, "For appearance by attorney at the return of the writ, and to do and perform such things as shall be required by the court."

As the cause of action was *expressed* in the *special writ original*; and as there was an affidavit of the debt, and the *exigent* marked; it was certainly the sheriff's duty, to have made further inquiry from the filacer into the *quantum* of the debt, (if he was not already satisfied about it,) before he discharged the defendant out of custody upon the mere undertaking of his attorney "To appear for him and reverse the outlawry." Therefore the rule ought to be absolute.

1484

Easter Term 4 Geo. 3. B. R.

1764

CRACEATT V.
GLEBOVE

If the sheriff can meet with the defendant, he may take him up again : but the plaintiff cannot sue out a *fresh* writ of *capias utlagatum*, against the defendant, after he has been taken on the former.

THE COURT were then clear, that this was not a case within the 12 G. 1. c. 29. And

Mr. Justice DENISON (who was then in court, though now absent,) thought the point in question had been settled. It had been determined,* he said, "That a defendant cannot reverse an outlawry without giving such bail as the law requires."

* It was so determined after long litigation, in Hil. term 1742. 16 G. 2. In this court, between Sir Geo. Hampson and Serocold.

It was then adjourned.

This matter being now mentioned again,

Mr. Justice YATES observed, that by the 13 Car. 2. stat. 2. c. 2. § 4. No sheriff can discharge any person taken upon a *capias utlagatum*, without a *superfedeas* first had : (the words are "Without a lawful *superfedeas* first had and received for the same.") And by 5 G. 2. c. 27. § 5. No special writ nor process, specially expressing the cause of action, shall be issued, where the cause of action (in a superior court) shall not amount to 10 l. But here the *capias utlagatum* RECITES a special original specially expressing the cause of action.

THE COURT (Mr. Justice Denison being absent) were very strongly inclined to be of opinion "That the sheriff had acted improperly," and told his counsel, that the better way would be, to put in bail : and in order to give opportunity for it, They

ENLARGED the RULE till Monday.

And afterwards,

The Sheriff undertook to pay the debt and costs.

(1 Black. Rep. 466. S. C.)

Saturday 2 June 1764.

Rex versus the Inhabitants of Leeds.

This case is already published, in my quarto edition of SETTLEMENT CASES, No. 169. p. 524.

Rex *versus* Latham et al. Six of the In-Bur-
gesses of Wigan.

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(1 Black. Rep.
468. S. C.)Monday, 4
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UPON shewing cause why informations in nature of *quo warranto* should not be granted against these six, whose right depended upon that of thirteen other persons (who had voted in the election of them into their offices;) to shew by what right they claimed their franchise of in-burgesses of this corporation; it appeared to be incumbent upon the prosecutors to invalidate the right of three out of 13, in order to turn the scale of the election. They had voted as being resident in-burgesses: but two of the 13 were objected to by the prosecutor's affidavits, as being aldermen, and thereby disqualified to vote as in-burgesses; five, as having been legally disfranchised, and never legally restored; and six, as not being actually and *bona fide* resident in *Wigan* at the time of the election. So that it was pretended, that even *all* the thirteen were illegal votes: however, it was agreed, "That the election would not hold good, if only *three* of these thirteen votes could be proved bad ones." It was therefore insisted, on the part of the prosecutors, that the election was *bad*.

Information, in nature of *quo warranto*, shall be granted, where right doubtful, and disputed, in order to try it, unless there has been such an acquiescence as ought to prevent it.

But *besides* this, there was another *general* objection to the validity of the election; namely, that the court, at which the election was made, was *improperly holden*; and therefore all that was done at it, was *totally void* and an absolute nullity. For, the prosecutors alledged and swore (to the best of their information and belief,) that it was essentially necessary to the competency of the corporate court, "That at least *one* of the BAILIFFS should be present at it:" whereas there was *no bailiff present* (as was very positively sworn) at the *original* court which was *adjourned* to the subsequent day; upon which subsequent day of adjournment the defendants were elected, at the *adjourned* court. Consequently, the *adjourned* court was (as the prosecutors alledged) an *incompetent* one, and just the same as *no court at all*; and every thing transacted at it must be *nugatory, ineffectual* and *void*.

They also insisted (and their opponents agreed) that it was necessary for the in-burgesses who voted, to be *resident* in *Wigan* at the time of their voting: and the only dispute was, "Whether six of those who voted for these six defendants were *actually and fairly* so in fact, or only *colourably and fallacioussly* so."

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The affidavits being very long; and the several questions that arose being much litigated at the bar, the Court took time to consider.

CUR. ADVIS.

Lord MANSFIELD now declared their opinion; and said that Mr. Justice *Denison* (who was now absent) had also been consulted by them: and they were all of opinion, "That the rules should be made absolute, in order to try the rights in dispute."

The first question, "Whether the presence of a bailiff be or be not *essentially necessary* to the holding of a court," is general, and goes *directly* to the validity of the election of the defendants: and the affirmation of this on one side, and the denial of it on the other are both sworn exactly in the same manner; both sides swear to their apprehension and belief. The bailiffs are not indeed named in the *file* of the court: but yet they may, by the constitution of the burrough, be an *essential* part of the court. Therefore, as it does not appear, "Whether the court at which the defendants were elected was a competent one or not," an information must go, upon *this* ground alone; unless there has been such an *acquiescence* as ought to prevent it.

2dly. Though an *acquiescence* for a great length of time may be a sufficient reason why the court should not interpose, *quieta movere*; yet *here* is no length of time: 'tis only 3 or 4 years. No certain rule is fixed for the particular and exact length of time that shall be considered as an *acquiescence*: and perhaps it is better, that none should be absolutely fixed; for, *circumstances* may very much vary the case, in this respect.

3dly. As to the *residence* too of electing in-burgessees, the facts are disputed, and therefore must be tried.

4thly. The disfranchised in-burgessees have been *restored* by the mayor alone, upon a *mandamus*: * but it is alledged, "That *he* alone had no right to restore them, and that he did it contrary to the consent and opinion of the body." Therefore their right appears to be *doubtful*.

5thly. The two that have been chosen *aldermen* are said to have *refused* accepting that office: and their rights are said to have been twice tried already, and *settled* by two verdicts; and therefore ought not to be now thus disputed and litigated over again.

6thly.

* V. post.
p. 1641.
Rex v. Holmes,
Mayor of
Wigan,
7 Feb. 1765.
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6thly. It is urged, that the right of persons *elected* ought not to be sent down to trial, upon a supposition of a deficiency of a right in their *electors*, UNTIL the right of such *electors* has been *first* tried and *disallowed*: and it has been questioned and debated, "How far the right of an elector who is in office and holds a franchise *de facto*, can be attacked upon an information granted and tried against a person elected by him:" or whether his right must then and upon that occasion be *taken for granted*, as he was a corporator *de facto* when he gave his vote.

But, as we are of opinion "That these rules must be made absolute on the *first* point," which is a general, and, if true, a *fatal* objection to the validity of the election; the information will be "For USURPING the office upon the crown:" and the CROWN may take what issues they think proper, to shew such usurpation. There is no instance of precluding the crown from insisting upon any objections that they shall be advised to take issue upon, in order to shew the defendant to have usurped the franchise.

Therefore we neither need to give, nor should give any opinion upon the *other* points: nor does the line seem to be fully and clearly drawn and fixed, "Where the rights of the ELECTORS can be gone into at all, or how far they can be gone into, on the trial of the right of the ELECTED."

RULES made ABSOLUTE for informations.

The End of Easter Term 1764. 4 G. 3.

Trinity Term.

4 Geo. 3. B. R. 1764.

(1 Black Rep.
476. S. C.)

Tuesday, 26
June 1764.

Swift, ex dimiss. Neale et Ux. *versus* Roberta.

Will of joint tenant not good, though the joint tenancy be severed before testator's death.

AN ejectment for a house &c, in *Well-Close Square* in *Middlesex*, coming on to be tried before Lord *Mansfield*, at the sittings after last term; the following case was specially stated, and reserved for the opinion of the court.

Richard Gilbert and *Frances Sophia Gilbert*, (now *Neale*) were upon the 20th of *January* 1754, seised as joint-tenants in fee, of the premises in question. *Richard Gilbert* on the 20th of *January* 1754, made his will, duly executed; and thereby devised in these words—"Imprimis, I give and bequeath all my part, right, title and interest which I have in an estate JOINTLY WITH MY SISTER FRANCES SOPHIA GILBERT, situate and lying in *Well-close Square* &c, to my beloved wife *Jane Gilbert*."

By indentures of lease and release dated on the 9th and 10th of *October* 1754, they made PARTITION: and the messuages in question were conveyed to the said *RICHARD* in fee.

RICHARD died in *August* 1757, without issue; leaving the lessor of the plaintiff his sister and heir; who claimed as heir at law to him. The defendant claimed under his will.

The question was, "Whether the plaintiff, under the circumstances of this case, is intitled to recover the premises in question in this ejectment."

It was argued, for the first time, on *Tuesday*, the 22d. of *May* last, by Mr. *Ashburst* for the plaintiff, and Mr. Serjeant *Hewitt* for

for the defendant : and the two questions proposed by Mr. Ashurst, and disputed between them, were—

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1st. Whether the *devise* made to the defendant by Richard Gilbert who at the time of making the devise was a JOINT-TENANT, though he AFTERWARDS made PARTITION, and had the premises for his purparty, was a good devise, abstracted from the consideration of the subsequent partition.

2d. Whether the SUBSEQUENT partition could make the preceding devise good.

Mr. Ashurst argued—

First—That a JOINT-TENANT *can not devise*, (though a coparcener may :) for the right of survivorship takes place of a joint-tenant's devise. This is settled established law.

For this, he relied on Littleton, sect. 287. and Co. Litt. 185. a. b. Both express in point.

Secondly—The deed of partition, made subsequent to the time of making the devise, can not effectuate and make good a prior devise, which was a bad one when made.

For, upon the statutes of wills, a will must be good at the time when it was made : it can not be made good by any subsequent event.

By the statute of 34, 35 H. 8. c. 5. § 4. (which is explanatory of the former act of 32 H. 8. c. 1. § 1.) persons having a sole estate in fee-simple, or seised in fee-simple in co-parcenary or in common, have power to devise as much as in them of right is, at their pleasure. But as the power is only given to persons sole-seised, or seised in co-parcenary or in common, it is clear, "That joint-tenants are EXCLUDED:" and joint-tenancy is a personal disqualification.

Upon these statutes, it is also clear, "That no future event can supply a defect of qualification which was wanting at the time of making the will:" as an infant testator's coming to full age, or a feme-covert testatrix becoming sole, or an insane person's recovering sanity of mind. In all such cases, the will is void unless it be republished after the person becomes capable of devising.

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1 *Siderf.* 162. *Herbert v. Torball*, was so determined, upon a will made by an infant.

To make a will good, the *seisin* which the testator had at the time of making, must *continue*: otherwise, there must be a re-publication.

3 *Co.* 25. *Butler and Baker's case*.

Dister v. Dister, 3 *Lev.* 108. where the testator made a bargain and sale, in order to make a tenant to the *præcipe*, and suffered a recovery to his own use.

Albby v. Laver, *Goldesborough* 93: where a renewed lease did not pass, (the former being surrendered.)

Yelverton v. Yelverton, *Cro. Eliz.* 401. A man can not grant or charge what he hath not,

Bunter v. Coke, 1 *Salk.* 237. After-purchased lands shall not pass by a prior devise.

So, in the present case, there ought to have been a *re-republication*: for, at the time of making this will, the joint-tenant *had not* the estate, in the *mode* that was necessary to qualify him to *devise* it.

In *pleading*, it is incumbent to alledge, "That at the time of making the devise, the devisor was *seised in his demesne as of fee*." But if it had been so alledged here, the adverse party might have alledged a *joint-seizure*, and *traversed* the *sole-seizure*.

He added further, that *supposing* this devise to have been good in it's original creation, yet the subsequent partition, which was made by deed of *lease and release*, would amount to a REVOCATION of it.

And he endeavoured to shew this, by citing 1 *Ro. Abr.* 614. title *devise*, letter O. (which does not prove it,) and the case of *Le Strange v. Sir Richard Temple*, 1 *Keb.* 357. and 1 *Siderf.* 90, and a case in *Showers's P. C.*

But as to *this* point, he was over-ruled immediately by Lord MANSFIELD and Mr. Justice WILMOT, who both agreed, that it had been determined "That a partition by deed, between

"tween tenants in common, did not amount to a revocation": and they particularized two cases in point, viz. *Luther v. Kidby*, 3 *Peere Williams* 169, 170. 9th April 1730, (mentioned there in a note,) and *Risley v. Lady Balinglaff*, Sir T. Raymond 240. Each of these two cases being the unanimous opinion of four judges. And Lord Mansfield added an observation, "That *constructive* revocations, contrary to the intention of the testator ought not to be indulged; and that some *over-strained* resolutions of that sort had brought a scandal upon the law."

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Mr. Serjeant Hewitt, for the defendant.

As to the *last* point, he thought it needless to say any thing at all about it; as the two cases last abovementioned were a full proof, "That a partition between tenants in common was no revocation of a prior will": and there was no difference (in this respect) between tenants in common and joint-tenants,

* As to the 1st. point—A joint-tenant has such an estate as he may devise, under these two statutes concerning wills.

He cannot indeed devise, so as to defeat the survivor, so long as *survivorship* continues: but if the *survivorship* be put out of the case, then there is nothing to hinder him from devising.

Now a partition discharges destroys and *extinguishes* this incident or incumbrance of *survivorship*. If one joint-tenant releases to the other (as he may do) this *extinguishes* his estate.

All this is consistent with *Littleton* § 288. and *Co. Litt.* 186.

And *Perkins* (section 500) is express, that "If a joint-tenant makes his will and survives, the will shall stand good."

2d. point. AFTER partition, the joint-tenant is in of the old estate: the partition operates only as an *extinguishment* of the other moiety.

And as to the expression in 34 and 35 H. 8. of "Having a sole estate"; he was sole seised of his own part and had power to dispose of it: he might alienate it, demise it, forfeit it. Why then might he not devise it?

Mr. Ashburst, in his reply, did not insist upon the partition's amounting to a revocation of the will: (though Lord Mansfield told him, he was at liberty to do it, if he was not satisfied about it.)

As to the rest, he said that joint-tenancy is a personal disability to devise the land; as infancy, insanity or coverture are,

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to do so : and it is *tacitly* excluded by the statute, by *not* being therein expressed, as coparcenary and tenancy in common are.

It is no argument to prove his power of devising it, to say " That he *might* have given it or aliened it in his life-time : " for, *that* would have defeated the survivorship ; but *this* does not.

As to the passage in *Perkins*, § 500. It may be laid out of the case : for, his assertion is *not* supported by the authorities he cites. [Mr. *Ashurst* said he had looked into the books referred to by *Perkins* ; and could find no such thing* in them.]

* Perhaps he looked into *Fitz-Herbert's Natura Brevium* instead of the old *Natura Brevium*.

2d. point. AFTER partition, the mode of the devisor's having the estate is altered ; and the will must be published anew.

Uterius concilium.

This cause now stood in the paper for a second argument. Mr. *Morton* was for the lessors of the plaintiff ; and Mr. *Eliab Harvey*, for the defendant.

THE COURT put it upon Mr. *HARVEY*, to shew how he could get clear of the statute of the 34 and 35 H. 8.

Mr. *Harvey* endeavoured to do it, by urging that the testator being sole-seised at the TIME when the devise OPERATED, that is to say, (at the time of his death,) it is a good devise under the statute of H. 8.

And this, he said, depended upon the *quality of the estate*, and not upon the *personal ability of the testator*. Where it depends upon the *personal ability of the testator*, it is *not* indeed sufficient that the disability be removed before the time of the operation of the will : it is necessary that the testator should have been free from all disability at the time of making it. But where it depends upon the *quality of the estate*, it then turns upon the time of the will's operating. And in the present case, which is of this latter kind, the testator was sole seised at the time of the OPERATION of his will.

Before the making of these statutes of wills (in 32 and 34 H. 8.) *none* could devise their inheritance, by the general laws of the land : but in most cities and burroughs, the right of doing it subsisted ; and many questions were agitated concerning such devises ; and many rules were laid down, and many principles established about them. One of those established principles

principles was "That a joint-tenant could not devise;" or (in other words) "That a person must be *sole-seised*, in order to "qualify and enable him to devise lands." And the intent of these statutes was, "To make the *general* law of the land "conform to these *local* customs."

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Upon the *former* of these two statutes, (*viz.* the 32d. of H. 8.) it was left *doubtful*, "Whether a joint-tenant could "devise by virtue of *that* act, or not;" the power being given to "Every person having any manors, lands or tene-
"ments holden in socage": and the act of 34 and 35 H. 8. was made to explain this doubt; and gives the power of de-
vising, "To persons having a *SOLE* estate in fee-simple, or
"seised in fee-simple in *coparcenary*, or in *common*." So that it is now established by this latter act, which adopts the known principles of the common law, "That a joint-tenant
"can *not* devise." And this is a remedial law, and there-
fore to be favoured; in order to promote the remedy, and
effectuate the intentions of testators.

The *reason* why a joint-tenant cannot devise, is, that the right of survivorship takes place in his companion immedi-
ately upon the devisor's death; and the surviving companion
is *paramount* the title of the *devisee*, who can only claim *under*
the devisor; whereas the survivor claims in his *own* right,
under the first feoffor. So is *Littleton* § 287. and *Co. Lit.* 185.
b. in his comment thereupon. And this *paramount* right
having instantly prevailed, upon the testator's death, there re-
mains *no* estate of inheritance for the devise to *operate upon*.

BUT, *if between* the time of *making* the devise and the time
of it's *operating*, the *jointure* be *severed*, and the *estate* *consoli-*
dated, then the devise will be *good*: for, there now remains
no paramount right, to prevail over it.

THIS doctrine is quite agreeable to *Littleton's* opinion just
cited: and it is also the opinion of *Perkins*; who in his 500th
section, title *devises*, says, "That a devise by a joint-tenant,
"of land devisable which he holds in fee *on the day of his death*
"jointly with a stranger, is not good; and the law is the
"same, with regard to an use in jointure &c. BUT *if such*
"devisor *SURVIVES all his joint-companions*, then *SUCH* devise
"is *GOOD*; as it is well shewn by my Lord *Littleton*, in his
"3d. book in the chapter of joint-tenants folio 58, and also
"in *Natura Brevium*, with the additions upon the writ of *ex*
"gravi *querela* &c; where there are several good cases con-
"cerning devises put and shewn &c." *Perkins* is clearly of
opinion himself, and he deduces it also from *Littleton*, "That if
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" a joint-tenant makes his will, and afterwards survives his
" companions, then *such* devise is good."

THUS it stood at *common law*, antecedent to the statute. And the statute adopts and proceeds upon the reasoning of the common law; and meant to make the law throughout the kingdom *conformable* to it in *every* respect: it does not destroy the former power of devising, which subsisted only partially, and not generally; but, on the contrary, establishes the *like* power, *generally* and all over the kingdom.

Upon this principle, the ESTATES must be considered, as they stood at the *time of the operation* of the will. And for that reason, no *livery* is necessary, nor *attornment*. (V. 3 Leon. 276, 277. Egerton's argument of Butler and Baker's case.)

A tenant in tail, with remainder in fee in contingency, may devise: and if he leaves no issue at his death, his devise shall be good.

The case of *lapsed* devises, (where a devisee in fee dies in the life of the devisor,) tends to prove this point: but a much stronger instance is the case of a man's devising *to his own wife*; which can only be supported upon this foot of considering the estate *as it stood* at the time of the will's *operating*: So if a devise be "to the *heir* of A," and A. dies in the life-time of the testator; A.'s heir shall take.

THE *present* case turns upon the *quality of the estate*: and therefore the devise is good, *without* re-publication or any other act done; as the testator was *sole-seised* at the *time of the operation* of the will.

Indeed where it depends upon the *personal ability or disability* of the testator, some other act must be done, after the disability is removed: as if a will be made by a *feme-coverte*, an infant or a mad person, it must be re-published after the disability is removed.

But where it depends upon the *quality of the estate*, the estate is *disencumbered* by the removal of the disabling circumstance: and it is enough if it be clear of any incumbrance at the time when the will *operates*. Here, the devisor was in to the same uses after the partition, as he was before; his intention remained the same as it was before; and the establishing the devise he has thus made, will not clash with any rule of law.

Mr. Morton, for the lessor of the plaintiff.

As to *Perkins*—His words do not import even his own opinion to be, “That the *very identical* will made by the “surviving joint-tenant *before* the death of his companion “would be good *after* it:” he only means, “That *if* a joint-tenant survives all his companions, he may *then* make a devise of the land before holden in jointure; which he could “not do before.” Nor can any such opinion as is ascribed to him by Mr. *Harvey*, be inferred from the books cited by Mr. *Perkins*.

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As to devises by *tenants in tail*—If a man has an estate tail and destroys that quality, and acquires a fee, such *acquired* fee will *not* pass by a prior will, without republication. In the particular case put by Mr. *Harvey*, of a tenant in tail, with remainder in fee to himself and his heirs, the estate would pass by the very words of the *statute of wills*; because the devisor *then* had a fee in the remainder; and the words of the statute are—“Having a sole estate in fee-simple, &c. in “possession, reversion or remainder.” But such devisable estate must be either a sole estate in fee-simple, or a fee-simple in coparcenary or in common. Whereas, *at the time* of Mr. *Gilbert*’s making this devise, he had *not* such an estate as the statute intends: for he *then* held in joint-tenancy with his sister; and the *express* bequest in his will is “What he had “jointly with his sister.”

Suppose Mr. *Gilbert* to have survived his sister, would the whole have passed by the present will? certainly not. And if so, how can his own share pass by it?

The general doctrine advanced by Mr. *Harvey* came in question in the case of *Butler v. Baker*, reported in 3 Cro. 25. and *Popham* 87. And *Popham* and *Anderson*, the two chief justices, and all the other justices and barons, held (contrary to *Periam*, *Clench*, *Clark*, *Walmesley* and *Fennor*, “That they were to consider what estate the devisor had in “the land at the time of his devise MADE, WITHOUT regard “to that which might happen by matter *ex post facto* upon the “deed of another: and at the time when that will was made, “the devisor had no other estate in the manor of *Hinton* than “jointly with his wife; and if so, it follows that the manor “of *Hinton* was then out of the letter and intent of the “law; for, he was *not then* sole seised thereof, nor seised in “coparcenary nor in common; and, by the words, he “should be sole seised in fee-simple, or seised in fee-simple “in coparcenary or in common.” [See particularly *Popham* 87. and 3 Co. Rep. 30. b. 31.]

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THE COURT, consisting of Lord Mansfield, Mr. Justice Wilmot, and Mr. Justice Yates, (for Mr. Justice Denison was absent) were clearly and unanimously of opinion, that a will made by a JOINT-TENANT during the continuance of the jointure, is *not* a good will (even as to his share of the estate,) under the statutes of wills in 32 and 34 H. 8. notwithstanding a subsequent severance of the jointure by a partition made after the time of making the will, and before his death; UNLESS there be a republication of it, after the partition: and they observed, that the deviser has expressly described this bequest as a right "Which he had in the estate jointly with his sister."

They all thought that this would have been a pretty plain case, if it had stood merely on the statute of 32 H. 8. which enacts, "That every person having any manors, lands, or tenements holden in socage, &c, shall have power to give and devise &c." And consequently there was no necessity of the latter act of 34 and 35 H. 8. to explain the former. But this latter explanatory act clears the matter of all doubt. It professes to be made *on purpose* to remove all doubts about the exposition of it, and to declare and explain its meaning: part of which declaration and explanation is this, "That all and singular person and persons HAVING a sole estate or interest in fee-simple, or seised in fee-simple in coparcenary, or in common in fee-simple, &c, &c, shall have power to devise &c," it is very clear, upon this statute, that the deviser must HAVE the estate at the time of MAKING his will: he cannot devise what he had not in him at the time of devising. LORD MANSFIELD said, that by the feudal law there could be no devise of land, as constituting an heir: but a devise of land was considered as a limitation of the deviser's estate by a revocable act; and upon the custom, and independently of the statute, a man could not limit an estate which he had not. And Mr. Justice Yates observed, that the manner of pleading a devise of lands shewed that the deviser must be seised of them at the time of making the devise: for the form of such pleading is, "That the testator was seised, &c; and being so seised, made his will, and thereby devised so and so."

The question therefore is, "Whether Richard Gilbert had a devisable estate in these premises at the TIME when he MADE his will."

And they were unanimous, "That he had not." For it "was only a joint estate;" which is *not* devisable. They all were clear, "That a joint-tenant cannot make a will of what he holds in jointure." And Lord Mansfield held, "That such

* such a will would be void, both at common law and upon "the statute." If it could operate at all, he said, it must operate as a severance of the jointure: for it could not operate otherwise. But it cannot operate in *that* manner; because a severance of jointure cannot be effected by *that* method. A *feoffment to uses* (which the statute means when it speaks of an act executed in the person's life-time,) would have severed the jointure: but a *will* cannot have that effect. Where it took place by particular customs, it was in the nature of a revocable appointment or limitation of the land *causa mortis*; and not like the *Roman Testament*, as a *constitution of the heir*. Therefore, before the statute, a man, by custom, could only devise lands which he was *then* seised of. Mr. JUSTICE WILMOT said, that the *time of making the will* was the *material time*, in this case as well with regard to the *quality of the estate*, as to the personal ability of the *testator*: for by the express words of the statute of 34 and 35 H. 8. he must have the estate, in order to be capable of devising it: and the word "*Having*" is a reason why an *after-purchased* estate should not pass. Now this man, who only held in *jointure at the time* when he made his will, had *not* a *devisable* estate, *when he made the devise*; which it was necessary that he should have had, at the *time of devising*, in order to make the devise good.

As to the passage cited from PERKINS 96 b. Title *Devises*, section 500. (which see at large, *ante*, p. 1493.) They were extremely well satisfied, that it could not be true, in the sense in which Mr. *Harvey* would have it understood; namely, "That if a joint-tenant, who holds devisable land jointly with other persons, makes a devise of such land, and *afterwards* happens to survive all his joint companions, then such *before-made* devise shall *thereby* BECOME a good one, (though it was confessedly a bad one before this event,) *without* being renewed or republished, or any other confirmatory act." The books he cites do not warrant any such conclusion: nor is there any foundation for supporting such a proposition. And (as Lord *Mansfield* observed) it would be absurd upon the face of it, to suppose that such a devise could be good for the *whole* of the estate. And both his lordship and Mr. Justice *Wilmot* remarked, that what *Perkins* says relates to *customary* devises only, and not to devises under the *statute*: so that it has still the less weight upon the present occasion.

N. B. It seems to me, that *Perkins* meant no more than this; that a joint-tenant, who *continues till the day of his death* to hold jointly with one or more other person or persons, can *not* devise: but if he survives all his companions, he then and thereby becomes CAPABLE of *devising*.

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dimiss.
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vising. And I apprehend, that he only cites *Littleton* and old *Natura Brevium*, in order to prove "That a devise by a joint-tenant is void;" and that he considers the latter part of his assertion, as a plain consequence of the former, and obviously clear without any proof.]

Per Cur.*

Let the *posse* be delivered to the PLAINTIFF.

(1 Black. Rep.
483. S. C.)

Friday, 29

June 1764.

Carriage standing at livery, distrainable for rent by lessor of premises.

Francis *versus* Wyatt.

THIS was an action in *replevin*, upon a *distrs* for rent.

The *replevin* was brought by Mr. *Francis*, the owner of a chariot which stood in a coach-house belonging to and part of *Mat. Wilkinsons* LIVERY STABLES; which chariot Mr. *Wyatt*, the landlord of the premises, had *distrained* for rent due to him from *Wilkinson*: and *Wyatt* avowed the taking of it as a *distrs* for rent. To this avowry, Mr. *Francis* pleaded in bar, that the coach-house in which it was taken, was part and parcel of certain other coach-houses and stables known by the appellation of the *Talbot Livery-Stables*; whereof one *Matthew Wilkinsons* was the tenant and occupier, under a demise from the avowant Mr. *Wyatt*, for a term of years, at the annual rent of 60*l*. That *Matthew Wilkinsons*, during such his occupation of the premises, used and followed the trade and business of a common public livery-stable keeper, for keeping gentlemen's horses and setting up their coaches and carriages; and used the premises, in his said trade and business, for the keeping common public livery stables and coach-houses, for keeping gentlemen's horses and setting up their coaches and carriages; and that the plaintiff Mr. *Francis* set up his chariot there, at livery, with the said *Matthew Wilkinsons*, as at a common public livery-stable-keeper's; and that the avowant took his chariot so standing in the said coach-house, as a *distrs* for rent due to him from the said *Matthew Wilkinsons*: and so concludes, that he took it of his own wrong. To this plea in bar to the avowry, Mr. *Wyatt* the avowant demurs: and Mr. *Francis* joins in demurrer.

And the question was, "Whether a gentleman's chariot, which stood in a coach-house belonging to a common LIVERY-STABLE-keeper, was DISTRAINABLE for rent due to the landlord from the LIVERY-STABLE-keeper, for this coach-house,

"house, which (together with the stables &c.) he rented
"of the landlord who distrained it."

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This point was twice argued, first, on *Friday* the 25th of *May* last, by Mr. Serjeant *Nares* for the landlord, and Mr. *Asbburst* for the owner of the chariot; and again on *Friday* 29th *June* 1764, by Mr. *Blackstone* for the avowant (the landlord,) and Mr. *Clayton* for the plaintiff in replevin, (the owner of the chariot.)

Upon the first argument, the serjeant insisted, that a LIVERY-STABLE-keeper differs widely from an INN-keeper; and that even HORSES standing at livery in a livery-stable would not be intitled to the like privilege from being distrained for rent due for the livery-stables, as a horse put up at an inn would be, from being distrained for rent due for the inn; and much less can a CHARIOT without horses, put up in a coach-house belonging to and parcel of a livery-stable, be intitled to such privilege.

An INN-keeper has a right to detain the horse till he be paid for his keeping. The reason is, because the inn-keeper is bound to receive the horse: and he gives credit to the thing, not to the person. So a farrier, who shoes a horse. So a common carrier. So likewise a taylor; who is bound to make the cloaths. 22 Ed. 4, 49.

But it must be the horse of a guest or traveller, left at an inn and fed, which the inn-keeper may thus detain: he cannot detain goods left with him. 2 Ld. Raym, 867.

Whereas here is a coach-house rented for a year, not occasionally used for a small time only: and the credit is given to the person, not to the thing. Moore 777.

In a case of *Brenan v. Currint*, in B. R. Tr. 1755. 28 G. 2. A farrier insisted on retaining a horse, for his keeping and cure. The court entered into the general doctrine, and determined (upon the case in *Cro. Car.* 271, 272. *Chapman v. Allen*.) "That the farrier could not retain the thing; because there was a special agreement, and the credit was given to the person."

But a LIVERY-STABLE-keeper cannot detain a horse (as an inn-keeper may;) because he is not bound to take in a horse: much less can he detain, or is bound to take in, a chariot WITHOUT horses.

A LIVERY-

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A LIVERY-STABLE-keeper is not bound to quarter soldiers, as an inn-keeper is. 1 Salk. 387. *Parkhurst v. Foster*.

Neither are LIVERY-STABLE-keepers liable to the inconveniences that inn-keepers are liable to; as taking out licences, and a great number of other inconveniences.

Therefore they ought not to enjoy the same privileges; nor is there the same foundation for their under-tenants to claim any exemption from the general right which landlords have "To distrain what they find upon the premises." And this gentleman, Mr. Francis, is nothing more than an under-tenant to Wilkinfon for this coach-house.

A LIVERY-STABLE-keeper must rest upon his own agreement: he has no privilege himself; and none can be claimed under him. *Yelverton* 66. *Cafe de Hosteler*; Cro. Car. 271. 272. *Chapman v. Allen*; 2 Ld. Raym. 687. *Yorke v. Greenaugh*; and 1 Salk. 388. *York v. Grindstone* S. C. Cro. Jac. 188. 189. *Gelley v. Clerk*; and in a case of *Crozier v. Tomlinson*, in C. B. at the *Essex* (or *Hertfordshire*) affizes before Lord Ch. J. Willes, a race-horse was holden liable to distress, in a stable at *Barnet*, let to an inn-keeper for a guinea.

Mr. *Ashhurst*, contra; for the plaintiff in replevin, (the owner of the chariot,) argued, that the doctrine of *retainer* is uncertain, and not applicable to the present case. And he demied that the inn-keeper's right to detain was founded upon the principle of his obligation to receive. For a manufacturer (who is not bound to accept the work) has a right to retain; (as was holden in *P. 9 W. 3. Collins v. Ongley*, before Holt Ch. J. cited by Lord Ch. J. *Ryder* in the case of *Brenan v. Currant*;) so has a factor also. And taylor's are not bound to make cloaths for all who ask them.

The right of landlords, "To distrain the property of a third person for rent due from their own tenants," is founded upon reasons of public convenience, and calculated for the prevention of fraud: and the exceptions out of the general rule are, all of them tending to the benefit of trade and commerce and general advantage.

Co. Lit. 47. a. 2 Lutw. 1578. *Kimp v. Cruzes et al.* a Rol. Abr. 668. Letter F. title "Le biens de que poient estre distraime." 2 Bulstr. 270. *Robinson v. Walter*. Cro. Eliz. 596. *Reale v. Burley*.

But

But there is no case directly in point.

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As to the case of *Crozier v. Tomlinson* at Hertford assizes, the only question was, "Whether the stable was or was not parcel of the inn?" and it was holden, "That it was not." It was a mile distant from it. That case therefore is not applicable to the present.

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Mr. Serjeant Nares, in his reply, observed, that there was no surprise upon the owner of this chariot: he was fully apprized of the fact of it's being a livery-stable and not an inn.

And he cited 3 *Lev.* 260, 261. *Fowkes v. Joyce.*

UPON the second argument, Mr. BLACKSTONE, on behalf of the avowant (the landlord) argued, that no privilege of exemption from being liable to distress for rent in arrear, could be claimed by the owner of the chariot, but upon one of these foundations, viz. either the analogy between a livery-stable and a common public inn, or the principle of general utility and convenience to the community,

1st. As to the former—An inn is *publici juris*: and every man has a right to put up at it. Formerly it has been questioned "Whether a man could have erected an inn, at his own pleasure" (as it should seem :) at least, it appears that common inns are so much devoted to the service of the community, that they are obliged to receive all guests and horses. 3 *Bulstr.* 269. *Robinson v. Walter.* *Palmer* 367, and 374. *Rex v. Collins and three others*, and 2 *Ro. Rep.* 345. S. C. And the protection that they receive from the law is founded upon their being compellable by law to take in guests and horses. But that is not the case of a livery-stable-keeper. He is not bound obliged or compellable to receive coaches or horses: he stands upon the foot of private contract only; and may refuse to take in coaches or horses unless upon his own terms. There is no reason therefore why he should receive or be at all intitled to any particular or special privilege, protection or exemption from the law. And the addition of the epithets "common" and "public," to the description of this livery-stable-keeper and his coach-houses and stables, makes no real difference in the case. The distinction between the obligation by law, and the standing upon the foot of private contract, is clearly shewn by Chief Justice Popham, in the case of *Hofsteler*, *Poph.* 66. In *Bro. Abr.* title "*Distress*," p. 251. pl. 56. *Brian Ch. J.* puts the privilege of exemption of cattle or goods from being liable to distress, upon their

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their being in the place *by authority*. And so also 1 *Ro. Abr.* 668. title "*Distres*," letter *J.* pl. 12. declares the reason of the exemption to be "Because the *law gives liberty* to put "them there." Lord Ch. J. *Coke* likewise, in *Co. Litt.* 47. a. gives the *same* reason, *viz.* their being there "*By authority of law*." But in the present case, the chariot was *not* in this coach-house by authority of law, but on a mere *private contract*.

2dly. As to *public utility or convenience to the community*—No cases can be cited to support a notion, "That a privilege "of exemption from a distress for rent can be maintained "upon *this* foot."

If this chariot had been sent to a coach-maker's to be *repaired*, and had been distrained there for rent due from the coach-maker, *that* case might have seemed to fall within some of the cited cases: *that* would have afforded a pretence to exemption, from the *necessity* of sending it thither for that purpose. But there is *no necessity* that a gentleman lies under, to set up his chariot at a *livery-stable*. And the *inconvenience* would be much greater on the side of the *landlord*, if he should be *debarred of his legal right* "To distrain goods found upon his premises, for rent in arrear," than any that could arise from allowing him this established security for his rent, in the case of a person who appears to be no more than an *ordinary under-tenant*, and without any reasonable *pretence* of exemption from the general law of distresses.

Therefore he prayed judgment for the avowant.

Mr. *Clayton, contra*, (for the plaintiff in replevin,) premised, that it stood admitted on the pleadings, "That this *Matthew Wilkinson* (the tenant) kept a *common public livery-stable*." And he argued, that *such* a *livery-stable* is exactly upon the foot of a *common inn*, and intitled to the *very same* privileges and exemptions; and is equally to be protected upon the principles of *necessity, utility and convenience to the community*, though of more recent establishment indeed than inns: and therefore *such* a *livery-stable* is equally within the *reason* of the cases, as inns are; like *new trades*, which are under the *same* protection as *old* ones. Consequently, *such* a *livery-stable* is equally within the general reason of *exemption from distress*, for the sake of *public utility*, as cloth at a *taylor's*, cloth at a *weaver's*, a horse at a *farrier's* (to be shod,) a horse that brings goods to market to be sold, the goods themselves so brought, goods on a wharf or at a warehouse for exportation, goods delivered to a carrier to be carried for hire, wool in
a neigh-

a neighbour's barn, goods in the hands of a factor. In all these cases, the law gives the privilege in respect to *trade and utility*: the privilege or exemption is *not founded on any obligation to receive* the goods or other things. A factor is not bound to receive goods: yet he may retain them. Nor do I know that a taylor is bound to make my cloaths; or that a farrier is obliged to shoe my horse. And to prove "That the *true foundation* of the exemption from distress in the excepted cases, is the *detriment the common weal would suffer* if such things should be liable to distress for rent," he cited *M. 7 H. 7. 1 Fitz-H. Abr. 252. tit. "Distresse,"* pl. 8. *Noy. 19. Traffel v. Morris. Co. Lit. 47. a. Cro. Eliz. 549. Read v. Burley. Salk. 249, 250. Gifbourne v. Hurst.*

And here it appears, that the landlord *knew* this to be a *common livery-stable*, and *consented* to it.

Mr. *Blackstone*, in reply, observed, that there is no such thing known in the law, as a *common livery-stable*, in any *technical* sense of the word "*common*," or in the *same* sense in which it is applied to an inn (which is called *commune hospitium*.)

He said, Mr. *Clayton* had compared the present case to many others which it did not all resemble, and in which the exemption is founded upon very sufficient reasons; and a very good rule is laid down for such cases, in 1 *Salk. 250.* (where goods delivered to a carrier were holden to be privileged,) viz. "That the law has given the privilege, in respect of the *trader*:" but those reasons are not applicable to this case; no more are any arguments drawn from a right of *retaining goods &c. till payment or satisfaction*. This case does not all differ from that of goods put into a *common lodging-house*, and *there* distrained by the landlord for rent in arrear.

Lord MANSEFIELD and the two judges* present saw this question in such a light with regard to the consequences of it, and the inconvenience that might attend it, *even to the landlords owners and keepers* of these livery stables *themselves*, as well as to gentlemen who used them, (in case this distress should be *solemnly adjudged* a good one,) that they intimated to the landlord (the avowant) who happened to be personally present, attending the event of this cause, that it might be well worth his while to consider, whether it would be for his *own interest*, to wish, "That judgment should be *formally* pronounced for him."

* Mr. Justice
Wilkes, and
Mr. Justice
Yates.

But

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But Mr. *Clayton*, who was counsel for Mr. *Francis*, (the plaintiff in replevin,) informing them that the attorney general was retained to argue the point on his side,

THE COURT ordered an

Uterius Concilium.

However, Mr. *Francis*, perceiving the opinion of the court to be flatly against him, did not think proper to bring the question to a third argument.

And indeed it seems extremely clear, that his chariot was liable to this distress; and that there is not the least shadow of legal claim for an exemption.

John late Bishop of Lincoln, now Bishop of Salisbury, *versus* Wolforstan.

(1 Black. Rep.
490. S. C.)
Friday, 29 June
1764.

Grant of advowson after church actually vacant, void; but no lapse incurs, till after induction to a second benefice.

* See all the pleadings at large, in Mr. Serjeant *Wilson's* Reports, part 2d. p. 174. to 179. And also the three arguments in C. B. and the judgment there, *ibidem* p. 179. to 202.

THIS was a writ of error from the common pleas, upon a judgment given there against the bishop of *Lincoln*, and *Thomas Whitehead* his clerk, in a *quare impedit* brought by the grantee of the advowson, in fee, of the church of *Great Sheepy*; in which *quare impedit*, the * pleadings had gone on to a plea, a replication, and a rejoinder; to which rejoinder there was a special demurrer, and joinder in demurrer: and the judgment below was given against the bishop upon the badness of his *rejoinder*. But it now appeared manifest to this court, that the *plea* and the *replication*, and the *rejoinder* were all of them bad; so that it stood, here, upon the DECLARATION only. The declaration set forth a grant of the advowson made to the plaintiff, in fee, by the persons seised of it, on the 9th of November 1759. It then set forth the statute of 21 H. 8. c. 13. §. 9. against pluralities; and stated the facts necessary to shew his right to the action; viz. an avoidance of the church, and his own presentation thereupon, and the refusal of his presentee by the bishop.

The particulars of the facts stated were—That *Great Sheepy* is a rectory, a benefice with cure of souls, of above the yearly value of eight pounds. That *Thomas Griesley*, the incumbent, accepted and took another benefice with cure of souls, namely, the living of *Seale*; and was instituted, admitted and inducted in possession of the same. That thereupon the plaintiff

plaintiff below presented *Thomas Hall* to the rectory of *Great Sheppy*: who tendered himself to the bishop, and was refused by him.

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The bishop's plea (which was a bad one) admits the incumbency of *Griesley*, and his acceptance of the living of *Seale*: but supposes the avoidance of his former church to have been made by his INSTITUTION to the second, on the 31st. of *October* 1759; and then, by computing from the INSTITUTION, shews that six months elapsed: whereupon he collated *Thomas Whitehead* to it, by lapse, on 20th of *June* 1760.

The replication (which was an informal one) specifies the time of *Griesley's* INDUCTION to *Seale* to have been upon the 22d of *December* 1759; and alledges that upon the 20th of *June* 1760, the day when the bishop collated his clerk, *Mr. Thomas Whitehead*, six months from the INDUCTION of *Griesley* to *Seale* had not elapsed.

The bishop's rejoinder insists upon the lapse incurring at the end of six months from the time of *Griesley's* INSTITUTION to *Seale*; and traverses his refusal of *Hall* before he himself had collated his own clerk, or that *Hall* tendered himself to him before he had collated the other, or within six months after the INSTITUTION of *Griesley* to *Seale*.

To this rejoinder the plaintiff demurred, both generally and specially: and the bishop joined in demurrer.

Mr. Blackstone argued for the plaintiff in error (the bishop:) and he said, that the real question (if it could be cleared from the special pleadings) was, "Whether the plaintiff in the *quare impedit* had a right to present for this turn." And he endeavoured to shew, "That he had not," for these two reasons; first, that the church was VACANT at the time when the grant was made to the plaintiff; so that he had no sort of right to present: secondly, that six months had elapsed from the time of *Griesley's* INSTITUTION to the living of *Seale*; and that the plaintiff's presentee did not tender himself within that time, or before the collation of *Whitehead* by the bishop by virtue of the lapse; which lapse incurred (as he insisted) at the end of six months after *Griesley's* INSTITUTION to the second living.

He observed upon the plaintiff's replication, "That it was informal, by introducing new matter, viz. *Griesley's* induction to *Seale* upon the 22d of *December* 1759:" whereas the question depends (as he hoped to prove) upon *Griesley's* institution, not upon his induction to this second living.

He

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He then stated the facts, as they appeared upon the pleadings, to stand thus—That *Griesley*, being incumbent of *Great Sheepy*, was instituted into the rectory of *Seale* on the 31st of October 1759. That he was inducted to it on the 22d of December 1759. That the grant of the next presentation to the rectory of *Great Sheepy* was not made to the plaintiff till the 9th of November 1759; (at which time, the church of *Great Sheepy* was, as he insisted, become vacant by the INSTITUTION of *Griesley* to *Seale* upon the preceding 31st of October.) That the plaintiff presented *Hall* to *Great Sheepy*, upon the 29th of March 1760: but that *Hall* did not tender himself to the bishop within six months after the institution of *Griesley* to *Seale*, nor before the bishop had collated his clerk. And that the bishop collated upon the 20th of June 1760; (at which time, more than 6 months were elapsed since *Griesley's* INSTITUTION, though it was within 6 months from his induction.) From these premises he inferred, that, as the church became actually vacant upon the 31st of October, the plaintiff could claim no right to present to it, under a subsequent grant made in November: and that the bishop had, upon the 20th of June, a right to collate by lapse, no presentation at all having been then tendered to him.

1st. The grant (by a subject) of the next presentation to a church, or of the advowson in fee, (for there is no difference between them in this respect,) AFTER the church is actually fallen vacant, is a VOID grant quoad the fallen vacancy; both because it is a *chose in action*; and also because it tends to *simony*.

Cases in point to this effect, are *Hil.* 28 *H.* 8. *Dyer* 26. a. pl. 165. 11 *Eliz.* *Jenkins's Cent.* 236. Case 13. S. P. by all the judges of *England.* P. 11 *Eliz.* *Dyer* 282. b. pl. 28. S. P. M. 39, 40 *Eliz.* *Cro.* *Eliz.* 600. *Bennett v. Bishop of Norwich.* M. 42, 43 *Eliz.* *Baker v. Rogers,* *Cro.* *Eliz.* 788. S. P. P. 2, 3 Ph. & M. *Agard v. Bishop of Peterborough,* 1 *Andersf.* 15. S. P. twice. *Dyer* 129. b. pl. 66. S. C. *Moore* 12. S. C. and *Benloe* 43. S. C.

These are cases of next presentations which were granted after the respective churches were fallen vacant: the following are grants of advowsons made after actual vacancy.

Trin. 10 *Eliz.* *Stephens v. Disley et al.* cited in 1 *Anderson* 15. *Stephens v. Wall, Disley et al.* *Benloe* 192. S. C. and *Hil.* 43. *Eliz.* *Leak v. Bishop of Coventry and Dr. Babington,* *Cro.* *Eliz.* 811.

2dly.

2dly. The bishop had a right, upon the 20th of June 1760, to collate by *lapse*; the six months being expired before that time, and no presentation tendered to him: for, we say, the church became void by the INSTITUTION of *Griesley* to the living of *Seale*.

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The words of the statute of 21 H. 8. c. 13. are these—
Section 9 enacts, “That if any person or persons having
“one benefice with cure of soul, being of the yearly value
“of 8*l.* or above, *accept and take* any other with cure of
“soul, and be *instituted and inducted* in possession of the same,
“that then and immediately after *such possession* had thereof,
“the *first* benefice shall be adjudged in the law to be *void*:
“and (by section 10.) it shall be lawful to every patron
“having the advowson thereof, to present another; and the
“presentee to have the benefit of the same, in such like
“manner and form as though the incumbent had died or re-
“signed; any licence, union, or other dispensation to the
“contrary thereof obtained, notwithstanding.”

Now though it be true, that the words of this act are
“*Instituted and inducted*”; yet it has been holden, “That
“INSTITUTION *only*, without induction, *vacates* the former
“benefice.”

Digby's case, in *Hil. 41 Eliz. B. R. 4 Co. 79.* is a full
and solemn determination in point, and agreed to by all the
judges in *England*; and cites a like determination in *C. B.*
“That he who is *only instituted*, is, within this act of 21 H.
“8. said to *have* a benefice with cure.”

Robins v. Gerrard and Prince, in *Moore* 434 to 448. S. C.
agreed by all the judges of *England*: (p. 448.) *Robins v.*
Prince, *Goldesbr.* 162. S. C.

Lord Ch. J. *Hobart* likewise, in the case of *Colt and Glover*
v. Bishop of Coventry and Lichfield, p. 157, 158. lays it down,
“That a benefice is taken, received and had *by institution*
“*only*”; and says, “It was so judged in *Digby's* case.”

2 *Ro. Abr.* Title “*Presentment, lapse*”; letter *A.* p. 1 &
2. After lapse incurred to the ordinary, the patron may pre-
sent *before the church is full*: “But if the ordinary collates by
“lapse; and afterwards, *before induction*, the patron presents,
“the ordinary is *not* bound to receive.”

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In the case of *Shute v. Higden*, Hil. 22, 23 C. 2. Lord Ch. J. *Vaughan* says, that by admission and institution into the second benefice, the first is *ipso facto* so void that the patron may present another, if he will: and if the first living be of the value of 8 *l.* or above, the patron, at his peril, must present within six months, by 21 H. 8. though if it be under that value, no lapse shall incur, until deprivation of the first benefice, and notice.

But there is no need, in the present case, of either deprivation or notice to the patron: for, this former benefice being above that value, the cession of it does not depend either upon the common law or the ecclesiastical law, but upon the act of parliament; and therefore the patron must take notice of it at his peril. This appears clearly from *Dyer* 237. a. pl. 29. *Godbolt* 23. Case 33. 4 Co. 75. b. *Holland's case*. Cro. Eliz. 601. *Armiger v. Holland* S. C. and *Watson's Complete Incumbent* 49.

Mr. Serjeant *Burland* argued this case on behalf of the defendant in error, (the plaintiff in the *quare impedit*.)

As to the pleadings—he said that the bishop's rejoinder was given up below; and is certainly bad, in that it departs from one matter to another, which other he might have originally resorted to: it does not fortify the matter of his former plea; but introduces new matter. And this is a departure: *Finch's Law* 57. a. And it puts in issue a matter not asserted in our replication; viz. "That he did not refuse to admit *Hall*, before the time of his collating *Whitehead*."

If the replication is informal, the bishop can not take advantage of that informality, upon our special demurrer to his rejoinder: he can only take advantage of matter of substance.

Now upon the substantial part of the case, it appears that the plaintiff has a good title; and that no lapse had incurred.

1st. It does not judicially appear upon the record, that the grant to the plaintiff was subsequent even to the institution.

The defendant can not avail himself of his own bad pleading, to find fault with the pleadings of his adversary. He can not connect them together: nor is the particular day on which the grant is, under a *videlicet*, mentioned to have been made to the plaintiff, either material or issuable: and here it is only mentioned thus, "viz. on the 9th of November 1759." It is no where alledged, "That *Griesley* was instituted to *Seale* before

it before the advowson was granted to the plaintiff; if it had, that might have been traversed. But as it is here set out, the plaintiff might have given any particular day in evidence: this 9th of November is not material nor traversable.

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Cro. Jac. 202. *Lane v. Alexander*. Yelv. 122. S. C. *Skinner* 660. *Rex v. Bishop of Chester* (in point.) 2 Lev. 211. *Holbeck v. Bennett*. 2 Mod. 184. *Stroud v. Bishop of Bath and Wells and Sir George Horner*. 5 Mod. 287. *Blackwell v. Eales*.

Therefore this priority of *Griesley's* institution to *Seale*, to the plaintiff's grant is not admitted by the plaintiff. Nor is any thing admitted by the demurrer; as the rejoinder is confessedly vitious: and this appears by 2 Ro. Rep. 23. *Holford* and *Platt's* case.

Neither indeed is it alledged, "That the institution was upon the 31st. of October 1759;" nor "That the institution was prior to the grant." And this being an unfavourable case, the court will not assist them to take advantage of a forfeiture.

2dly. The lapse does not incur from the time of the institution, but from the time of the induction: for it is the INDUCTION into the second benefice that vacates the first; and not the institution to it.

The doctrine of pluralities is laid down at large, in *Moore* 434. to 448. *Robins v. Gerrard and Prince*; and in *Linwood's Provincials* 135, 137, 138.

The latter is in point "That the first church is not vacant till INDUCTION into the second." And in the case of *Agar v. Bishop of Peterborough and Denny*, issue was taken upon the induction to the second benefice; whereby it seems to be allowed, (as it is observed in *Moore* 12,) "That admission and institution do not make the first void, without induction." And in the argument of the case of *Robins v. Gerrard and Prince*, it is admitted "That the first benefice is not actually void, till induction." *Moore* 442.

Watson's Complete Incumbent, Chapter 2. collects many cases to this effect. In the case of *Winchcombe v. Bishop of Winchester and Pullstone*, *Hobart* says "He is not within the statute of 21 H. 8. if he be not inducted." And *Cro. Car.* 354. *Rex v. Archbishop of Canterbury and Pryst*, goes upon the same principle.

The words of the statute of 21 H. 8. are taken from the provincials: and the cases since the statute have been uniform, as to LAPSE:

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BEFORE the statute, the patron had his election, "Whether he would present as upon a vacancy; or stay till after deprivation and notice of it." But no lapse incurred by deprivation, *without* notice: he was not bound to take notice at his *peril* till INDUCTION.

Godbolt 23. 4 Co. 75. b. *Holland's case*. 4 Co. 79. b. *Digby's case*. *Moore* 438, 542. *Cro. Eliz.* 601. 2 Ro. Abr. 361. Title "*Presentment*," Letter L. pl. 6. and 2 *Lutw.* 1306, 1307. at large, in the case of *Sharpe v. French*.

Mr. *Blackstone*, in reply—As to the *pleadings*—He said he could by no means give up the *bishop's rejoinder*: which he denied to be a *departure*. It avers "That *Hall* did not tender himself within the six months:" which averment, he said, was no departure from the plea, but a necessary support of it. And the traverse, "That he did not refuse to admit *Hall*, before the time of his collating his own clerk," is a right and proper traverse."

And he insisted that it appears sufficiently upon the pleadings, "That the institution of *Griesley* was upon the 31st of October; and that the grant to the plaintiff was not made till the 9th of November following:" for the day under the *scilicet* is materially alledged; and is a *positive* and *substantial* averment of the *particular* day. And he offered to maintain, "That the day under the *scilicet* is material, where the precise exact time is the *gist* of the action."

As to *lapse* incurring from the time of the institution—He said he must leave that point upon the cases he had cited, and the general reasoning: which he would press any further; having observed, by what had been dropped from the bench, during the argument, that the court was of opinion "That it was to be computed from the time of *induction* only."

THE COURT were extremely clear, that, as to *lapse*, the avoidance of the former benefice does not take place till INDUCTION to the second: and Lord MANSFIELD and Mr. Justice WILMOT both said, that this was a point settled, that it ought not now to be disputed.

THE COURT were equally clear, that a grant of a next presentation, or of an advowson, made AFTER the church was actually FALLEN VACANT, was a void grant, quoad the fallen vacancy.*

* But it is good as to the *advowson* itself; (unless it be a corrupt purchase.) H. 16 G. 3. C. B. *Barret and Reynell, Cl. v. Glubb (Clerk) and Rolle*.

But they thought that the FACT *was not sufficiently ascertained upon these pleadings*: for though it appears clearly enough, "That the grant was made on the 9th of November 1759," yet it does not appear "At what time Griesley was instituted to the second benefice." Consequently, the objection can not be let in, "That it was VACANT when the grant was made." It is no where averred "That the grant was subsequent to the avoidance:" nor is there any thing that appears upon the pleadings, sufficient to support the objection. Therefore they

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AFFIRMED THE JUDGMENT,

unless cause.

Afterwards. (on the last day but one of the term)

Mr. Blackstone attempted to shew cause; and hoped to satisfy the court, that he was not precluded from taking his objection to the grant: for he relied upon it, that "If a proper time be alledged, where the precise exact time is the gist of the action, the day under the *scilicet* is then material."

But THE COURT were still of opinion "That he could not get at his objection, upon *these pleadings*." For all the pleadings are *bad*, except the plaintiff's declaration; which is good. The whole stands, therefore, upon the declaration only: which states the conveyance of the right to the plaintiff to present, to be by a grant made on the 9th of November; and, upon the face of it, shews a good title in the plaintiff to present. The plea means indeed to put the matter upon the question "Whether the six months should be computed from the INSTITUTION, or from the INDUCTION." But the plea, and likewise the rejoinder, are both out of the case; for they are both of them *bad*: and being *bad*, there is a total END of them, to every intent and purpose whatsoever. You cannot therefore extract from them a fact to destroy the plaintiff's title; for they are nullities, and just as much so, as if they had never been pleaded at all.

Per Cur.?

JUDGMENT AFFIRMED.

Mr. Serjeant Burland thereupon prayed costs and damages for the delay, upon 3 H. 7. c. 10: citing Dyer 77 a. pl. 34. Cro. Eliz. 617. Graves v. Short.

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But

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But he withdrew this motion ; thinking it more adviseable to drop it, as he could only have a rule to shew cause *next term*.

N. B.—It was observed by Mr. *Justice Wilmot*, upon the first argument, “That though the patron has six months “ from the induction, to present, (so that no lapse shall “ incur within that space of time ;) yet he *may*, if he “ pleases, present *before* the induction.”

Note also, that Lord MANSFIELD and Mr. JUSTICE WILMOT both said, that the *true* reason why a grant of a fallen presentation, or of an advowson, *after* avoidance, is not good, *quoad* the fallen vacancy, is the *public utility*, and the better to guard against *simony* ; NOT for the *fictional* reason of it's being then become a *chose in action*.

N. B. A writ of error returnable in parliament was brought upon this judgment.*

* Qu. What came of this writ of error ?

I believe, *nothing* : for, I never heard any more of it ; and I do not find it amongst my Parliament-Cases.

Tuesday, 3
July 1764.

Reed *versus* Cole,

If party in agreement for insurance, has a loss, and is contributory to the losses of the other parties therein, they must be contributory to his.

THIS was an action on the case, upon articles of agreement constituting a society for the mutual assurance of each other's ships : whereby they engaged that when and so often as any of the ships wherein any of the members of this society had property, should be lost, the rest should contribute to such loss. But every member was obliged to prove a property of 500 l. in a ship : and if he would cease to be a member, he was obliged to give *six months notice*. The plaintiff shewed that he had the requisite property in a ship, and became a member ; and that the ship was lost. Plea—that the plaintiff had *parted with* his interest in the ship before the loss happened. Replication—that by articles of agreement with the purchaser of the ship, the plaintiff had agreed to pay 500 l. *if a loss happened within three months* ; and therefore he was *interested during the voyage*. Demurrer to this replication ; and joinder in demurrer.

Mr. *Wallace*, for the defendant, argued that the stipulation between the plaintiff and the defendant was at an end, as soon as the plaintiff had *disposed of his property in the ship* : and his private agreement with the purchaser of it, without the consent

sent of the society, is no more than his own *private* and *personal* insurance made to the purchaser.

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REED V. COLE.

Mr. *Ashurst*, *contra*, for the plaintiff, argued, that he ought to recover; both upon the words of the agreement, and within the equity of it: for he had *not ceased* to be a member of the society, nor could cease to be so, without giving *six months notice*. Therefore he *remained bound to contribute* to the losses of the rest: and *consequently*, the rest were bound to contribute to *his*. And he stood as a trustee for the person to whom he had sold his interest in the ship: it was not necessary that he should continue to hold it in his own right. He *remained contributory* to the losses of the other members, as he had not given six months notice of his ceasing to be one.

Mr. *Wallace*, in reply, urged, that as the property was out of the plaintiff at the time when the loss happened, he could take no benefit of the articles of mutual insurance amongst the members of this society. For, the parting with his property in the ship was his *own act*: and if he remained contributory to the losses of the other members, that arose from his own *neglect* in not giving the six months notice, as the articles required him to have done.

BUT THE * COURT were of opinion, that as he continued *contributory* to the losses of the others, at the very time when this loss happened, it was but just and equitable, and within the words and meaning of the agreement, that *they* should contribute to *his*. He still had an interest in the safety of the ship: he had not parted with *all* his interest in it; but continued interested *quoad* this loss.

* Mr. J. Denison was absent.

Per Cur.

JUDGMENT for the PLAINTIFF.

Rex versus Le Chevalier D'Eon.

(1 Black. Rep. 510. S. C.)

MONSIEUR D'EON, who came over hither in the quality of secretary to *M. le Duc de Nivernois* the late French ambassador, and after the duke's departure remained here charged with the affairs of *France*, was afterwards (upon a particular occasion) invested with the character of minister plenipotentiary. Upon the arrival here, of the present *French*

Wednesday, 4 July 1764.

Trial not put off on affidavit of absence of material witnesses, when the case suspicious, and the witnesses foreigners, and resident abroad, never likely to return to England.

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Rex v. D'Eon.

Ambassador the Count *de Guerchy*, *M. D'Eon* set up a press in his own house, and in his book there printed under his own inspection, *libelled* the Count *de Guerchy*. Upon this, an information was filed against him by Mr. Attorney General, not only for printing and publishing this libel, but as an infractor of the law of nations: and notice of trial was given. Whereupon *M. D'Eon* (by his counsel) moved to put off the trial, on account of the absence of several material witnesses, whom he specified in his affidavit: and his affidavit contained the usual assertions requisite for putting off a trial, and particularly "That they were *material* witnesses for him; that he " could not safely go to trial without their evidence; and " that he had *hopes and expectation* of procuring their presence " by next *Michaelmas* term."

Upon shewing cause against putting off the trial, it appeared, that the libel was not printed or published till *March* or *April*; and that these witnesses went away from *England* to *France*, in the *preceding* *November* or *December*. It appeared also, that they were *natives of and resident in France*; that they were in the service of that crown; and that there was no probability of their being *sent over*, or even *permitted to come over*, to give evidence on behalf of *M. D'Eon*, (who stood, at this time, in no favourable light, at his own court, but very much otherwise.)

After a full hearing of counsel on both sides (*M. D'Eon* being present,)

* Mr. Justice
Denison was
absent.

THE * COURT were unanimous that there appeared no sufficient reason for putting off the trial.

They granted that in all cases, whether criminal or civil, and whether the nature of the proceeding be instantaneous or otherwise, a trial shall not be so hurried on, as to do injustice to the defendant; an affidavit in *common* form may be sufficient where no cause of suspicion appears: but men take such latitude to swear in the *common* form, that where a suspicion arises from the nature of the question or from contrary affidavits, the court will examine into the *ground* upon which the delay is asked; and have, in *criminal* as well as civil cases, refused to put off a trial, notwithstanding an affidavit in *common* form.

It is necessary therefore in such a case as this, (1st.) to satisfy the court that the persons *are material* witnesses; 2dly. To shew that the party applying has been guilty of *no laches* nor neglect, in omitting to apply to them and endeavour to procure their attendance; and 3dly. to satisfy the court that there

there is a *reasonable expectation* of his being able to procure their attendance *at the future time to which he prays the trial to be put off.*

But in the present case, all these reasons fail.

These witnesses are *sworn* to be material, as the defendant apprehends and believes. But on the contrary, it appears (negatively) that they *can not* be material: for, as they were gone out of *England* some months before the printing or publication of this book; they could not be consulant of the facts of the offence laid in this information. If their knowledge relates to any circumstances that may serve to mitigate the punishment in case he should be convicted, *that* sort of evidence will not come too late after conviction of the offence, and may be laid before the court by affidavits.

But if it should appear upon the case proved at the trial, "That the defendant was prejudiced by refusing this delay," the court could set it right by granting a new trial; which had often been *said* upon like occasions; but *no* case had yet happened, where any prejudice appeared to have been done by the court's refusing, upon particular circumstances, to put off a trial notwithstanding the *formal* affidavit.

As to their being *sent* out of the kingdom by the Count de *Guerchy* himself, on purpose to prevent their giving testimony in the cause, (which has been alledged;) there neither is any proof of it, nor is it possible that it could be so: they were actually gone, *before* the fact which is the subject of the charge was committed. It is impossible that they could be sent abroad by *M. de Guerchy*, to prevent their giving evidence in *this* cause, the foundation of which *did not exist* at the time when they went. If they *had* been material witnesses for the defendant in this cause, and *had* been sent away by the person on whose account the prosecution is carried on, *that* indeed would have been a sufficient ground for putting off the trial till they could be had. But here is no pretence for such an insinuation.

Neither does it appear, that there has been the least endeavour used by this gentleman or any on his behalf, to get them over.

And as to any *expectation* of their *returning to England* by the next *Michaelmas-term* or at *any* future time, there does not seem to be any probability of it; nor does the defendant lay before the court any *grounds* of such an expectation. On the contrary, the *reverse* is highly probable; the presumption seems strong,

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strong, that they will *not* come. They cannot be *compelled* to come: and it does not seem likely that they will be *ordered* to come, for this purpose. These are *foreigners*, natives of and resident in *France*, and in the actual service of that king: which renders this case quite different from the *ordinary* cases of *English* witnesses being *accidentally* gone abroad, or gone for a small time *only*, and expected to return to their *own* country, their natural home and residence.

Upon the whole, they were clearly of opinion, "That the putting off the trial could not tend to *advance* justice, but on the contrary would *delay* it;" and therefore discharged the rule for shewing cause why it should not be put off.

RULE DISCHARGED.

M. D'Eon was soon after tried and convicted, upon so clear evidence, that he made no defence: and from the proof against him by witnesses and writings under his hand, it was impossible for him to make any defence. Yet he seems to have sheltered himself under some *salvo*, in swearing the persons in *France* to be "*material* witnesses."

Grant *versus* Vaughan.

(1 Black. Rep. 485. S. C.)

Wednesday 4th.
and Thursday
5th July 1764.Bearer of bill of
exchange, may
maintain an
action against
the drawer.

UPON shewing cause why a verdict which had been given for the defendant should not be set aside (upon payment of costs,) and a new trial granted,—the case appeared to be this—

The defendant *Vaughan*, a merchant in *London*, gave a cash-note upon his banker, to one *BICKNELL*, a husband of a ship of his: which note was dated "*London 22d. October 1763*," and directed to *Sir Charles Asgill*, who was *Vaughan's* banker; and was worded thus—"Pay to *SHIP FORTUNE, or BEARER*," so much. *Bicknell*, by some accident, *lost* this note. The person who *found* it, or who at least was in possession of it (however he might obtain that possession), came, four days after the note was payable in *London*, to the shop of *GRANT* the plaintiff, who was a tradesman at *Portsmouth*, and bought five pounds worth of tea of him, and gave him this note in payment, desiring to have the change out of it. *GRANT* (the plaintiff) stepped out, to make inquiry "*who this Vaughan might be?*" And upon being informed "*That he was a very good man, and that it was his hand-writing*," he readily gave the change out of the note, retaining the price of the tea. *Vaughan*, upon being apprized that

that *Bicknell* had lost the note, sent notice to Sir *Charles Aggill*, "Not to pay it." Whereupon *GRANT*, being refused payment, brought his action upon the case against *VAUGHAN*, and inserted *two counts* in his declaration; one, upon an inland bill of exchange; the other, an *indebitatus assumpsit* for money had and received to his use. The cause was tried by a special jury of merchants; who found for the defendant.

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VAUGHAN.

Sir *Fletcher Norton* and Mr. *Dunning* argued on the part of the plaintiff; and Mr. *Morton*, Mr. *Eyre* (Recorder of London,) and Mr. *Wallace*, on the defendant's part.

On the part of the defendant it was insisted—

That an action could not be maintained on either of these two counts.

That this is *not a negotiable note*; but only an *authority to receive* so much cash.

That *GRANT* did *not* take it upon the *credit of the DRAWER*; but upon the *credit of the person who GAVE it him in payment*.

That such a draught as this cannot be considered as a *negotiable bill of exchange*: for it was *not accepted*, nor *indorsed*; nor was it *protestable*; nor intitled to any day of *grace*. It is only a mere contrivance or convenience between the banker and the person who keeps cash with him. And Mr. *Wallace* not only insisted, that these cash-notes are never intended to be generally negotiable; but even supposed them to be confined within the extent of the bills of mortality, at furthest. A bill of exchange to *A. or bearer*, is a bill of exchange to *A. himself*; but is not negotiable. And there is* no instance (as the recorder said) of any custom of merchants, "For a bill of exchange being made payable to bearer," generally.

* See vide
1 Shower 235.
Hinton's case
34 C. 2. B. R.

In 3 *Lev.* 299. *Horton v. Coggs*, in C. B. P. 3 *W. & M.* on an action brought by the bearer of a goldsmith's note payable to *B. or bearer*, the custom "To pay to the bearer" was holden *too general*.

In 1 *Salk.* 125. *Hodges v. Steward*, P. 5 *W. & M. B. R.* —The first point resolved is, "That a bill of exchange payable to *J. S. or bearer*, is *not* assignable by the contract; "so as to enable the indorsee to bring an action, if the "drawer refuse to pay."

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VAUGHAN.

The *preamble* to 3, 4 *Ann. c. 9.* does not say one word about notes payable to *bearer*. It begins thus—"Whereas " it has been held, that notes in writing whereby the party " promises to pay unto any other person or his *order*, are not " assignable, &c." And though the words " *Or unto " bearer*," are slipt into the *enacting* part of the first clause, yet no part of the whole statute bears any relation to them.

In the case of *Morris v. Lee*, *Tr. 11 G. 1. B. R.* (which was an action brought by the indorsee of a note "To be accounted to *A.* or order, for 100*l.*") the court observed that the words " *Or order*" was the proper expression used in such notes, and mentioned in the act of parliament, *where it intended the note should be indorsable or negotiable.*

Arguments, therefore arising from cases upon notes of hand will not prove much in the present case.

And upon the *second count*, the plaintiff can have no pretense, they said, to recover against *Mr. VAUGHAN*: he can only resort to the person from whom he received or purchased the note. This note is not like a banker's note payable to bearer. However, even upon one of *them*, the bearer can not recover as bearer: for which, they cited the case of

* *V. post 1524. Walmesley v. Child.* *

If a bill is payable " *To bearer*" only, the *original advancer* of the money may indeed maintain an action against the drawer upon an *indebitatus assumpsit*, for money had and received to his use: but *no other* person can do so, though he comes by it fairly and upon a valuable consideration. And for this they cited the abovementioned case of *Hedges v. Steward*, in 1 *Salk.* 125.

The PLAINTIFF'S counsel insisted that this bill or note was in it's nature *negotiable*; and that such bills were in fact always considered as *negotiable* and *actually negotiated*, and commonly circulated as *cash*. And if they be, from the nature of the contract, *negotiable*, the finding of the jury can not alter the *law*: it is not the province of the *jury*, but of the *court*, to determine what is or is not an inland bill of exchange or a promissory note, *within the statute*. If the jury founded their verdict on *law*, they have mistaken the *law*: if on *fact*, it is directly *contrary* to the notoriety of the fact; and bank-notes alone are a full and sufficient proof of that. And it is not to be conceived, that they are negotiable *within* the bills of mortality, and not negotiable beyond or *out* of them: if they are negotiable *any* where, they must be so *every* where.

They

They object, "That it is not a bill of exchange, because "it is not *accepted*, nor can be *protested*, nor is intitled to a "day of *grace*, nor is *indorsable*."

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But it is a *negotiable instrument*: it is *not necessary* that it should be a *bill of exchange*. An *inland bill of exchange* is not like a *foreign bill of exchange*: for the former could not have been *protested*, before this act of parliament, nor needs to be so, since the act; whereas a *foreign one* always absolutely required it. This is just the same as a bill payable to bearer. The *name of the person* to whom such a bill is made payable, means nothing at all, in *general cases* of being made payable "To such a one or bearer": much less can it mean any thing in *this particular case*, where *no name of a person* precedes, but the payment is to be "To *ship Fortune*, or bearer."

Then it is extremely clear (and indeed admitted) that the plaintiff came by it fairly and honestly and *bona fide*, and upon a *valuable consideration*, and *without notice* of it's being a lost bill. He therefore stands in the place of BICKNELL, and is equally intitled to maintain his action, as *Bicknell himself* would have been if he had never lost it nor parted with it: and he is intitled to recover upon *either* of the two counts laid in the declaration. It is equal to him indeed, *which* of them he recovers upon: and there can be no doubt as to the *latter*. And as to the *former*, the court will not readily listen to objections about *forms*, when the true merits and honest title are clear and plain.

The only true and fair question is, "Whether BICKNELL "or GRANT ought to *bear this loss*."

And surely there can be no doubt, as between the man who *lost* the note (be it accidentally or carelessly,) and a *fair purchaser* of it for a *valuable consideration*.

This case was determined in the case of *Miller v. Race*, H. 31 G. 2. B. R. * That resolution was founded upon the * V. ante, fair purchaser's having a *better right* than the *loser* of a bank- P. 452. note; even though the man was, in that case, *robbed* of it.

Whoever gives a note payable to bearer, *expressly promises* to pay it to *every fair bearer*. However, an *implied promise* would suffice for our purpose.

This point is clearly settled by the act of 3 & 4 Anne c. 9, which puts notes of hand upon the same foot with both sorts of

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of bills of exchange, and makes them assignable (though choses in action.) It enacts, that all notes in writing, promising to pay to any person or order, or unto bearer, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons to whom the same is made payable; and that the assignee may bring his action in like manner as in cases of inland bills of exchange.

It is objected that the words "*or to bearer*" were not intended to have any operation; because no notice is taken in the *preamble* of the statute, of notes made payable to *bearer*, but only of notes which are made payable to a person or his order.

But *how could* any notice be taken of the *former*, in the *preamble*? such notes did not require *indorsement*: and the *preamble* only recites, "That the *latter* had been holden not to be assignable or indorsable over, within the custom of merchants; and that the assignee or indorsee could not, within the custom of merchants, maintain an action upon them against the drawer." But they were *negotiable*, before the act was made; and an action would *so far* have lain upon them, that they were evidence of a debt, and would put it upon the defendant to shew that the debt was satisfied. The person to whom such a note was given, might have declared in a *general indebitatus assumpsit for money lent*, and the note would have been good evidence of it: though he could not have declared upon the custom of merchants. This was settled in the case of *Clerke v. Martin*, P. 1 Ann. B. R. reported in 2 Ld. Raym. 757. and 1 Salk. 129. And Lord Ch. J. Holt was peevish there, and said, "That the continuing to declare upon these notes, upon the custom of merchants, proceeded from obstinacy and opinionativeness; since he had always expressed his opinion against them, and since there was so easy a method as to declare upon a general *indebitatus assumpsit for money lent*."

That action was brought upon a note payable to the plaintiff *Clerke* or his order, and brought by *Clerke* himself. But actions had been sometimes brought by the bearer before the making of the statute of 3 & 4 Ann. upon bills or notes payable to bearer only: particularly, in the case of *Nicholson v. Sedgwick*, P. 9 W. 3. in C. B. mentioned in 3 Salk. 69. but best reported in 1 Ld. Raym. 180.

Hinton's case, in 2 Shower 235, M. 34 C. 2. B. R. (though loosely reported) is on the plaintiff's side as far as it goes. It is plain that the plaintiff *Hinton* brought the action as bearer; and the case fully proves "That the action would lie, if the plaintiff

"plaintiff came by the bill of exchange honestly and on a
"valuable consideration"; this being Lord Chief Justice
Pemberton's general allegation.

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VAUGHAN.

As to the case of *Horton v. Coggs*, reported in 3 *Lev.* 299—
the reason given why the custom "To pay to the bearer" is too
general, (*viz.* "That perhaps the goldsmith, before notice
"by the bearer, had paid it to Barlow himself,") is a bad
one.

The case of *Nicholson v. Sedgwick* (or *Seldnith*, as it is
called in 3 *Salkeld*) was exactly like the case of *Horton* and
Coggs: and the court agreed, "That the action could not
"be brought in the name of the bearer; but ought to be
"brought in the name of him to whom the note was made
"payable." But the reason there given is not a sufficient
one: it is this, "That if the bearer should be allowed to
"bring the action in his own name it might be inconveni-
"ent: for then any one who finds the note by accident, may
"bring the action and recover." Whereas it appears by
Hinton's case, "That he must intitle himself to it on a valuable
"consideration: for if he come to be bearer by casualty or
"knavery, he shall not have the benefit of it." Neither does
that reason (if it had been a better one than it is) clash with
the present case; because this plaintiff did here pay a valu-
able consideration for the note.

And to urge the necessity of the action's being brought in the
name of the person to whom the note was originally made
payable would carry the matter too far: for that would prove
that BICKNELL himself could not have maintained the action;
since the note is not made payable to him, but to ship Fortune.
Yet without doubt, BICKNELL himself might have maintained
the action. And this appears by a remark of Lord Ray-
mond's, in reporting the case of *Tassel and Lee v. Lewis* (1
Lord Raym. 744.) "That if the party to whom the note is
"delivered, demands the money of the goldsmith in rea-
"sonable time, and he will not pay it; it will charge him
"who gave the note: *Hopkins v. Geary*, H. 1 Ann. B. R.
"Guildhall."

It would be absurd indeed to say, "That the bearer could
"maintain an action upon a note that he came dishonestly by."
Certainly, he can not: for he must prove, "That he came
"by it honestly."

As to the inference drawn * from the case of *Morris v. V. ante*
Lee "That these notes made "payable to bearer" were not 1518.
"intended to be negotiable;" it is impossible to suppose such
a thing: the contrary is most clear and apparent. This was
one of the matters which the act of 3 & 4 Ann. intended to
remedy.

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remedy. The cases relied on by the defendant were prior to that act: there is none, *since* the making of it, that can avail them. And there is no case at all, where it has been determined, that a note of this kind cannot be *given in evidence* upon a general *indebitatus assumpsit* for money *had and received*.

It is enough for the plaintiff that this note was *negotiable*. The bearer must prevail against the drawer in *some* mode of action; having come by it fairly and honestly. *Since* the act, the fair holder of a note payable to bearer may, by the *express words* of the act, *maintain an action against the drawer*: otherwise, the act would not put promissory notes upon the *same* foot with inland bills of exchange, as it professes to do. The words of it are—"Shall and may maintain an action for the same, *in such manner* as he might do upon any inland bill of exchange." And the interests of commerce require this determination. But there can be no sort of doubt on the latter count; as the note is evidence of the plaintiff's money being in the hands of the person who gave it.

Whether therefore this case be considered upon *principles of law*, prior to the act of 3 & 4 Ann. or upon *that act*, or upon what has passed *since* the act, it will appear that the plaintiff ought to *recover in this action*: and consequently, the present verdict is a *wrong* one, and ought to be *set aside*.

And no inconvenience can happen, nor will any injustice be done thereby: for the matter will be open to evidence, and all facts may appear.

LORD MANSFIELD said the case of *Nicholson and Sedgwick* was urged by the defendant's counsel at the trial: and, not being apprized of the point in question, till it came on to be tried before him, he was not fully aware of the cases which differed from it. And yet he was struck, he said, very strongly that, upon *general principles* that case was not agreeable to law and justice: and he then thought that the *reasons*, upon which that case and the other authorities relied upon by the counsel for the defendant at the trial, were grounded, were insufficient ones.

THAT "of the goldsmith's having perhaps paid the money to the original payee himself, before notice from the bearer," can never hold: it *cannot happen*, in the course of business, that the money should be paid to the nominee, before notice from the bearer.

Nor

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Nor was any satisfactory reason given, why an action might not be brought in the bearer's *own* name. The reason alledged, "That then any person who *finds* the note *accidentally*, may bring an action and recover," is insufficient; because the plaintiff in such action must prove that he came by it *bona fide* and upon a *valuable consideration*.

As to the *necessity* of bringing the action in the name of the *person* to whom the note was *originally made payable*;—it was impossible in the *present* case; because there was *no person originally named* as the payee: it runs "Pay to *ship* Fortune, or bearer." However, *if* there had been a person named, the reason would not hold: for the person so originally named may become *bankrupt*; or may be indebted to the drawer of the note, so as to give the drawer a right to *set off* such debt against the demand of the money due upon the note. So that if the courts of law should not allow the *bearer* to bring the action in his *own* name, there might be *no* relief at all. And it can never be supposed reasonable or legal, that the banker should have it left in *his* discretion or choice, to pay the money to one or the other as his fancy or inclination should lead him.

These thoughts occurred to me at the trial: and therefore I chose to take the opinion of the court.

I left two things to the consideration of the jury. The first was, "Whether the plaintiff came to the possession of this note *fairly and bona fide*:" (which necessarily includes his not having notice of it's being a lost note.) The second was, "Whether such draughts as this is, were, in the course of trade dealing and business, *actually* paid away and negotiated, or *in fact and practice negotiable*:" and I then considered *this*, as leaving a *plain fact* to them, upon which they could have no doubt.

But I am now clearly of opinion, that I *ought not* to have left the *latter* point to them: for it is a question of *law*, "Whether a bill or note be *negotiable*, or not."

It appears in the books, "That these notes *are*, by law, *NEGOTIABLE*." And the plaintiff's maintaining his action, or not maintaining it, depends upon the question "Whether such a note is *negotiable*, or not."

It appears likewise, "That the *bearer* of them may maintain an action *as* BEARER, where he can intitle himself to them on a *valuable consideration*."

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Hinton's case, in 2 *Shower* 235, is this—"Case on a bill of exchange, against the drawer, (bill not being paid) and payable to J. S. or to the bearer. The plaintiff brings the action, as bearer. And, upon evidence, ruled by the Lord Pemberton, that he must intitle himself to it on a valuable consideration, (though among bankers they never make indorsements in such case :) for if he come to be bearer by casualty or knavery, he shall not have the benefit of it." (And it would be absurd, to indorse such bills as are made payable to bearer.)

Crawley v. Crowther, 2 *Freeman* 257. Tr. 1702. in Chancery—"If a bill be payable to A. or bearer, it is like so much money paid to whomsoever the note is given; that, let what accounts or conditions soever be between the party who gives the note and A. to whom it is given, yet it shall never affect the bearer; but he shall have his whole money." So that the whole interest is transferred to the bearer.

1 *Salk.* 126. pl. 5. anonymous, *M. 10 W. 3. coram Holt Ch. J.* at *nisi prius* at *Guildhall*. "A bank-bill payable to A. or bearer, being given to A. and lost, was found by a stranger, who transferred it to C. for a valuable consideration: C. got a new bill in his own name. *Per Holt Ch. J.* A. may have trover against the stranger who found the bill; for, he had no title, (though the payment to him would have indemnified the bank :) but A. can not maintain trover against C. by reason of the course of trade; which creates a property in the assignee or bearer." It is negotiable by delivery.

• V. ante,
p. 452.

Miller v. Race, H. 31 G. 2. B. R.* The holder of a bank-note recovered against the cashier of the bank, though the mail had been robbed of it, and payment was stopt; it appearing, that he came by it fairly and *bonâ fide* and upon a valuable consideration. And there is no distinction between a bank-note and such a note as this is,

The act of 3, 4 *Ann. c. 9.* puts promissory notes upon the same foot, throughout, with inland bills of exchange. And therefore whatever is the rule as to inland bills of exchange payable to bearer, must be so likewise as to notes payable to bearer.

In a case between *Walmesley v. Child*, 11th December 1749, in chancery, where one of Mr. Child's notes, payable to bearer, was lost or stolen, and payment stopt by the true owner, who demanded that it should be paid to him; Mr.

Child

Child refused to pay it, without surety against the demands of a *future bearer*. The true owner brought his bill. Lord *Hardwicke* dismissed the bill, unless the true owner would find such security. And he went upon the principle, that no dispute ought to be made with the *bearer of a cash-note*, who comes *fairly* by it; for the sake of commerce, to which the discrediting such notes might be very detrimental.

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Upon looking into the reports of the cases on this head, in the times of king *William* the Third and queen *Anne*, it is difficult to discover by them, *when* the question arises upon a *bill*, and when upon a *note*: for the reporters do not express themselves, with sufficient precision, but use the words "*Note*" and "*Bill*" promiscuously. It appears, however, that there were different opinions about the manner of declaring upon them: Lord Ch. J. *Holt* got into a dispute with the city about it. He was of opinion, that the plaintiff could not declare *as upon a specialty*, (where the consideration could not be disputed:) but he all along agreed, that the plaintiff *might declare upon an indebitatus assumpsit*. The objection was, to bringing an action UPON *the note itself*, as upon a *specialty*: but I do not find it any where disputed, that an action upon an *indebitatus assumpsit* generally, for money lent, might be brought on a note payable to one or order.

See 2 Ld.
Raym. 758.

Great force arises from the act of parliament of 3 & 4 *Ann.* putting notes merely upon the foot of inland bills of exchange, and particularly *specifying* notes payable *to bearer*.

But upon the *second* count, the present case is *quite clear*, beyond all dispute. For, undoubtedly, an action for money had and received to the plaintiff's use, may be brought by the *bona fide* bearer of a note made payable *to bearer*. There is *no* case to the contrary. It was certainly money received for the use of the original advancer of it: and if so, it is for the use of the person who *has* the note *as bearer*. In *this* case, *BICKNELL* himself might undoubtedly have brought this action. He *lost* it: and it came *bona fide* and in the *course of trade*, into the hands of the present plaintiff, who paid a *full and fair consideration* for it. *BICKNELL* and the PLAINTIFF are *both innocent*. The law must determine *whether* of them is to stand to the loss. And, by law, it falls upon *BICKNELL*.

There ought to be a *new trial*.

Mr. Justice WILMOT—If a verdict be given *without* evidence at all, or *against plain evidence*, or *against law*, it ought not to stand.

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The two matters left to the consideration of the jury, upon this trial, were "Whether the plaintiff came by this note *fairly and bonâ fide*;" and "Whether such notes or bills as *this is, are in fact and practice negotiated.*"

The latter is as plain and notorious, as that there is a bank of England: no man can doubt it. The verdict is therefore *against evidence*, as to this point.

Probably, the jury took upon themselves to consider "Whether such bills or notes as this is, were in their own *nature negotiable.*" But *this* is a point of law: and by law, they are negotiable. Their verdict is therefore *against law*; and ought to be set aside. For, though when facts and law happen to be so complicated and intermixed that a jury can not help taking *both* into their consideration, it may be difficult or even impossible for them to avoid founding their verdict *upon both*; yet they are not at liberty to determine *contrary to law*: they ought to take their notion of law, from the direction of the judge who tries the cause. Formerly, a jury would have been liable to an *attaint*, for such a verdict: now, the court control their verdicts, by setting them aside and granting a *new trial*.

As to the *other* matter, the manner how this plaintiff came by the note—It appears to have been taken by him *fairly and bonâ fide*, in the *course of trade*, and even with the greatest caution: he made inquiry about it, and then gave the change for it. And there is not the least imputation or pretence of suspicion that he had any notice of it's being a lost note.

So that this verdict is clearly *against law*: for, if the note be negotiable, and the plaintiff came *fairly* by it, he was intitled to recover.

THOUGH both the claimants were innocent; yet, as BICKNELL lost the note, and GRANT took it in the *course of trade, bonâ fide* and upon a *valuable consideration*, GRANT has the *better equity*. But if their equity were only *equal*, it is a known and a good rule, that "*Melior est conditio possidentis*:" and *that* would be sufficient to turn the scale. If there was *negligence* on one side, and *none* on the other; *that* also would turn the scale: and if there be any on *either* side in this case, it should seem to be rather imputable to the person who *lost* it, than to him who thus took it in the *course of trade*.

If *this* bearer can not bring an action upon it, *no-body* can : for as it is *not* made payable to any particular person *by name*, no action can be brought *in* the name of such particular person.

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But this is a *negotiable* note ; and the action may be brought in the name of the *bearer*. "*Bearer*" is *descriptio persone* : and a person may take by *that* description, as well as by any other. In the nature of the contract, there is no impropriety in his doing so. It is a contract "*To pay the bearer, or to the person to whom he shall deliver it,*" (whether it be a note, or a bill of exchange :) and it is *repugnant* to the contract, that the drawer should object "That the bearer has no right to demand payment from him."

Then upon the cases—*Hinton's* case in 2 *Show.* 235. is *decisive* : and it is agreeable to common sense and reason, "That if a man comes by such a note or bill, *fairly* and on a "*valuable consideration*, he should have a right to maintain an action upon it *as bearer*."

The *reasons* given in the cases that are *opposite* to this, are altogether unsatisfactory. Those determinations strike at this great branch of commerce: if they were to prevail, they would put an end to all this species of it. *Who* would take a bill or note payable to one or bearer, if the person named in it might *release* it, or if a debt of his might be *set off* against it?

On the other hand, it is but just and reasonable, that if the bearer brings the action, he ought to intitle himself to it on a *valuable consideration*; and strictly to prove his coming by it *bonâ fide*.

EVEN before the statute of 3 & 4 *Ann.* Lord Ch. J. *Holt* himself thought, that an *indebitatus assumpsit* for money lent, or for money had and received, might be maintained upon such a note: and if it was a question *antecedent* to that act, I should stand by that first case of *Hinton*, rather than the latter ones which differ from it.

BUT that *statute* was made expressly and on purpose to *obviate these doubts*.

However, if you would suppose it made to introduce a *new* law, and that such an action could *not* have been maintained before the making of it; yet it is the manifest and professed intent of the act, to put promissory notes upon the *same foot*

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with inland bills of exchange: and it clearly means to make *notes payable to bearer*, liable to actions brought *upon* such notes as upon a specialty.

And no case having happened upon this head since the making of the statute, is a circumstance which shews that the statute was *so understood*, and that the true and sound construction of it is "That promissory notes *should* be put upon the *same foot* with inland bills of exchange." If it should be construed otherwise, it would follow, "That inland bills of exchange would be upon a *better foot* than promissory notes;" which would be contrary to the words and meaning of the statute.

THIS, now under consideration, is a *negotiable instrument*, which, I think, participates *more* of the nature of a *promissory note*, than of a bill of exchange. But taking it as a bill of exchange,—*A bill of exchange is a promise "To pay the money, if the drawee does not pay it,"* consequently, the payee may bring the action against the drawer.

In this particular case, if the *bearer* can not bring the action, *who can?* *no person* at all is named: it is "Pay to *ship* Fortune, or bearer." Therefore this particular case is *out of all the cases cited*. For, they say "That the action must be brought in the name of the *person to whom* the note is made payable:" but there is *no* such person in the present case.

It would be of infinite inconvenience, and would introduce the utmost confusion, if it were to be established "That the bearer of a bill or note made payable to bearer could *not* maintain his action upon it."

As to it's being negotiable *within* the bills of mortality, and *no further*; there is no colour for such a distinction: it must be negotiable *every where*, if it is negotiable *at all*.

Upon the whole, I think this to be a *verdict against law*; and am of opinion that it ought to be *set aside*.

Mr. Justice YATES delivered his opinion much to the same effect; and clearly held the verdict to be *against law*.

It was *not within* the province of the jury, to determine upon the *negotiability* of this note: it was a question of *law*, not of fact, "Whether such a bill or note was or was not negotiable."

And

And nothing can be more peculiarly negotiable than a draught or bill payable to *bearer*; which is, in it's nature, payable from hand to hand, *toties quoties*.

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And he was of opinion, that an *action will lie* for the bearer of such a bill.

The reasons given against it, in the cases which have been cited by the defendant's counsel, are not at all satisfactory.

It had been doubted, it is true, "Whether that *species* of "action where the plaintiff declares *UPON the note itself* as "upon a *specialty*, was proper:" but here is a count upon a *general indebitatus assumpsit for money had and received to the plaintiff's use*. The question "Whether he can maintain this action," depends upon it's being *assignable*, or not. The *original advancer* of the money manifestly appears to have had the money in the hands of the drawer: and therefore *he* was certainly intitled to bring this action. And if he *transfers* his property to *another* person, that *other* person may also maintain the like action, *whoever* has money in the hands of another, may bring such an action against him. This appears from the determination of the case of *Ward v. Evans* reported in 2 *Ld. Raym.* 930; where not a shilling of money had passed between the plaintiff and defendant; and yet *Holt* and *Powell* both held, "That an *indebitatus assumpsit* for monies received to the plaintiff's use, properly lay." In the present case, the drawer had money in his hands belonging to *BICKNELL*; and *BICKNELL* must be considered as having delivered this instrument to the plaintiff *GRANT*; which is tantamount to an indorsement. (A *real indorsement* of a note payable to *bearer* would have been *absurd*.) The delivery of it must indeed be proved: and the *circumstances* of the present case do amount to a *proof* of a delivery of it to the plaintiff. And there is no doubt about his having come by it *fairly, bonâ fide*, and on a *valuable consideration*.

There would be great inconveniencies; if such an action as this is, might not be brought by the *bearer*. If no action could be brought but in the name of the person to whom the bill or note was *originally* made payable, that person might *release* the action; or a debt due from him might be *set off* against it, in account: and so the *true owner* of the note might *lose* the whole or part of it, though it was transferred to him upon a *valuable consideration*.

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Trinity Term 4 Geo. 3. B. R.

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As to the notion of it's being negotiable in *London*, and not *elsewhere*, there is no foundation for such an imagination. It must be equally so out of *London*, as in *London*: and it is just the same as a *bank-note*.

Upon the whole, I think the jury have done wrong: and therefore the verdict ought to be *set aside*.

Per Cur' (unanimously and clearly)

RULE made ABSOLUTE (for a * new trial.)

* The plaintiff, upon such new trial, recovered the money.

Rex versus Justices of Peace for Wiltshire.

(1 Black Rep. 467. S. C.)

Presentment of highway, being out of repair, by a justice of peace upon his own view, is traversable generally.

ON Saturday the 2d. of June last, Mr. *Thurlow* shewed cause why a writ of *mandamus* should not issue, directed to the justices of the peace for the county of *Wilts*, commanding them to receive and proceed upon a TRAVERSE to a certain PRESENTMENT made by a justice of peace upon view, against the inhabitants of the tything of *Connock* in the same county, for not repairing a highway within the said tything.

The cause shewn by Mr. *Thurlow* was, that, as this was a presentment in the sessions made by a justice of peace upon his own knowledge "That the highway was out of repair," a GENERAL traverse could not be admitted: for, though such a presentment by a justice of peace upon view be traversable as to all other points, yet it is conclusive so far as the view and knowledge of the justice goes; and the fact of it's being out of repair can not be disputed. Consequently, though a special traverse ought to be received, a general one ought not.

This power of presentment by any one justice upon his own proper knowledge, "Of any highway not being well and sufficiently repaired and amended," is given by 5 *Eliz. c. 13. § 9.* which refers to 2, 3 *Ph. & M. c. 8.* And 3 *W. & M. c. 12.* has also a relation to the same subject.

And it has been holden, "That the party against whom such a presentment is made, can not take a traverse to the want of repair of such highway."

Keilway 34 a. *Dalton, c. 26. Crompton* 110. (not 131, as it is cited by *Hawkins*.) *Hawkins's P. C. Lib. 1. c. 76. § 72.*
p. 217.

p. 217. (who acknowledges this, though he does not enter into the reason of such an exposition of the clause. *Dyer* 13 b. p. 64.)

And in the case of **The King against The Inhabitants of Hornsey*, in B. R. Lord Ch. J. *Holt* held, that where a justice of peace presents a highway upon his *view*, to be out of repair, there the parties are *stopped* to plead "That it is in repair." It is true indeed, that the other judges were against him; and held, "That the parties *might* traverse the non-repairing, though the presentment was on *view*."

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Rex v.
WILKINSON
Justices.
* See this case in 5 Reports; viz. 4 Mod. 38. Trin. 3 W. & M. 1691. *Holt* 338. S. C. of the same term. 12 Mod. 13. S. C. of the next term, M.

3 W. & M. 1691. 1 Shower 270 of Trin. 34 and 291 of M. 3 W. & M. Carthew 212. of a later term than any of the others, namely, Hil. 3 W. & M. 169. 1 half. Not one of these five reporters say *what* became of the case; excepting that Shower, in p. 291 says "Per Cur. ordered to stay." Note, Three of the first four represent even *Holt* himself to say, "That the defendant *may* traverse." The words here cited by Mr. Thurlow are taken from Carthew's report of the case.

Mr. *Dunning*, *contra*, argued in support of the rule, that the justices were obliged to receive the traverse *generally*, and that the defendant had a *right* to traverse the ways being out of repair, notwithstanding that the presentment was made by the justice upon his own *view*.

The words of the 5 Eliz. c. 13. §9. are that "Every justice of peace shall have authority, upon his own knowledge, in the open sessions, to make presentment of any highway not well and sufficiently repaired and amended &c.: and every presentment made by any such justice of peace upon his own knowledge as is aforesaid, shall be as GOOD and of the SAME force strength and effect in the law, as if the same had been presented found and adjudged by the oath of twelve men."

It can therefore be NO MORE than equal to an indictment, or to presentment by twelve men on their oaths: both of which are traversable in all points. The traverse must apply to the thing presented: and that is the want of repair. It is traversable in the same manner as indictments for forcible entries, or for trespass: that is in all points.

Serjeant *Hawkins*'s own opinion is in point, against the old exposition of the clause; which (by the way) is not to be found in the books referred to in his margin †: the statute expressly saves to every person that shall be touched by any such presentment, "His LAWFUL TRAVERSE to the same presentment, AS he might have upon any indictment of trespass or forcible entry, by the laws of this realm, before the making of that statute": and, as the serjeant thinks, it is clear, "That

† See lib. 2. p. 217.

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REX V.
WILTSHIRE
Justices.

"That every defendant to any such indictment *may traverse* the *WHOLE* matter alledged against him." Therefore he ought to have the same benefit, in the present case.

A coroner's inquest finding a person *felo de se*, is traversable.

THE COURT thought proper to enlarge the rule, to the present *Trinity* term. For, it appeared, upon a discussion of the question, at the bar, and on the bench, and upon inquiry, into the practice in different *counties*, that there had been a *great VARIETY* both of *OPINION* and *PRACTICE* about this matter.

Mr. Justice WILMOT said, that a notion had long prevailed, and seemed to be countenanced by the old books, "That a presentment made by a justice of peace, pursuant to 5 *Eliz. c. 13. § 9.* of a highway's being out of repair, could *not* be controverted as to the *fact* of it's being out of repair;" and he knew that the late Mr. Justice *Abney* was of that opinion, and thought "That the statute had trusted the eye of the justice with the view of the repair:" but he did not know, he said, of any *judicial determination* that way, And he had always understood, that for about 30 years past, the notion and practice had been *contrary*; and for his own part, he understood such a presentment to be as traversable as an indictment. And the act of parliament puts it upon the same foot: for the word "*adjudged*" by the oath of 12 men, means nothing more than "*found* by a grand jury." The words of this act can only apply to the *repair*: and the traverse puts the *fact* of it's sufficiency immediately in issue.

Mr. Justice YATES observed, that there is no jurisdiction in this kingdom, where a defendant can be *convicted unheard*. †

And Lord MANSFIELD thought the reasons for it's being *traversable*, to be very strong.

The RULE was enlarged.

And—

Lord MANSFIELD now declared (generally and without saying more,) "That they were all of opinion, that a *mandamus* should go, commanding the justices to receive and admit a *general traverse*."

RULE made ABSOLUTE.

Baddeley

† V. Rex
w. Roupel,
Tr. 1776. 16
G. 3. B. R.
presented at a
leet, for keep-
ing a bawdy-
house.

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Baddeley *versus* Leppingwell.

THIS was an action of trespass for breaking and entering the plaintiff's close called the Hop-Ground. The defendant pleads "Not guilty;" and also a justification of his entry, under a grant in fee from *Thomas Asburst*, esq; lord of the manor of *Heddingham-Borough* in *Essex*, made to him on 10th *December* 1761, by his steward, at a court-baron; to hold the said close to him and his heirs, by copy of court-roll, according to the custom of the manor. The plaintiff, in her replication, admits that *Thomas Asburst* esq; was lord of the manor of *H.* and was seised in fee of the close: but alledges that at a court of the said manor holden upon the 3d. of *July* 1754, he made a prior grant of it to the plaintiff and one *Ellen Baddeley* her sister; to hold in coparcenary, by copy of court-roll: and that *Ellen* died; and thereupon, at a subsequent court, the lord granted her moiety to the plaintiff in fee, and she was admitted thereto on 25th *June* 1756, and so became sole seised. The defendant, in his rejoinder, alledges, that the lord had made a former grant to *Thomas Ives*, in fee; who died; and the premises thereupon descended to *Thomas Ives*, his nephew and heir; who conveyed the same to him the defendant, and traverses the GRANT alledged in the replication to have been made by *Thomas Asburst*, esq; to the plaintiff and her sister *Ellen Baddeley*, in manner and form as in and by the replication is alledged. And upon this traverse of the GRANT alledged in the replication, *issue* is joined.

The cause was tried at the *Essex* assizes, before Mr. Justice *Rathurst*: and a special case was stated to the following effect.

The trespass being proved, upon the first issue taken upon the plea of Not guilty, the case (upon the second issue) appeared to be—

That *Thomas Ives* was seised in fee of the place where it was committed; and that he surrendered it to the use of his will, and then made his will, and died: which will was as follows—"In the name of God: Amen. I *Thomas Ives* of *Castle-Heddingham* in the county of *Essex* victualler, being *&c.*, do make *&c.* I give and bequeath unto *Clement Boreham* of *Rowhedge* in the said county of *Essex* victualler, the house I now live in, situate and being in *Castle-Heddingham* aforesaid, and called or known by the name or sign of the *Cock*, for and during the term of his natural life; he PAYING
" THEREOUT

Friday, 6th.
Monday, 9th.
of July 1764.
Intention of
testator to be
collected from
the whole of the
will, which col-
lection must
be founded on
the writing
itself.

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LEPPING-
WELL.

" THEREOUT yearly and every year, by half-yearly payments,
 " forty shillings a year to Robert Boreham my grandson: and
 " after the decease of the aforesaid Clement Boreham, to be
 " equally divided to Robert Boreham, Sabill Boreham, and
 " Jeremiah Boreham, the children of Robert Boreham de-
 " ceased. Item I give and bequeath my two copyhold tenements
 " now in the tenure or occupation of Edward Tavogood and
 " Elizabeth Savill, widow, being in Castle-Heddingham afore-
 " said, to Sarah Boreham, the daughter of Elizabeth Bore-
 " ham widow; she paying THEREOUT forty shillings a year to
 " her sister Elizabeth Boreham. Item, the forty pounds that
 " my daughter Elizabeth Boreham aforesaid has of mine, I
 " give to Anne Boreham and Mary Boreham my grand-daugh-
 " ters; to wit, 20 l. a-piece share and share alike. Item, I
 " give and bequeath to my brother John Ives 50 l. and do
 " also acquit him of a note I have under hand for 50 l. more.
 " Item, I give to the children of John Fardersworth that he
 " had by his first wife, 15 l. Item, I give to Sander Wal-
 " ford's three children 15 pounds. My mind and will is,
 " that what legacies I have herein given, shall not be paid till
 " after the decease of me and my wife, and 3 months after.
 " And lastly, I do hereby nominate make and appoint my
 " said wife, Clement Boreham aforesaid, and John Ives, ex-
 " ecutrix and executors of this my will. In witness whereof
 " &c, the 3d. day of December 1740. Thomas Ives.

That the estate devised by the will of the said Thomas Ives
 to Sarah Boreham consisted of two cottages and the HOP-
 GROUND in question; and was, at the time of his death, of
 the yearly value of FIVE pounds and six shillings.

That at a court-baron holden for the manor of Heddingham-
 Borough on 4th. of April 1743, Sarah Boreham was admitted
 to the said premises, (prout the admission) and made a sur-
 render to the use of her will; and afterwards devised the
 same (prout the will;) and died.

That at a court-baron holden for the said manor on 17th
 June 1747, Elizabeth Boreham was admitted, (prout that ad-
 mission.)

That at a court-baron holden for the said manor on the 3d.
 July 1754, the plaintiff and her sister Ellen were admitted to
 the premises in question, (prout that admission.)

The defendant claimed under Thomas Ives, the son of John
 Ives who was brother and heir (according to the custom) to
 Thomas

Thomas Ives the testator; and at a court holden on 10th December 1761, was admitted to the premises in question, (prout his admission.)

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The questions submitted to the court were—

1st. Whether *Sarah Boreham* took an estate in fee, or for life only, under the will of *Thomas Ives*.

2dly. If she took an estate for life only, then whether the defendant could take advantage thereof, on the issue joined upon these pleadings.

Mr. Leigh argued for the plaintiff: Mr. Ashurst, for the defendant.

Mr. Leigh insisted (upon the 1st. question) that *Sarah Boreham* took an estate in fee, under this devise of the tenements "To her, she PAYING thereout for y shillings a-year to her sister *Elizabeth Boreham*."

For where a testator lays such a charge upon the estate devised as may render it, by any possibility (even though not within probability) a burthen instead of a benefit to the devisee, in any year; the devisee shall take in fee: otherwise, indeed, if the payment is only directed to be made out of the rents and profits.

Now in the present case, *Sarah* the devisee may be a loser by the devise, unless she takes a fee: for, the annuity charged upon her is not restrained to *Sarah's* own life; but is a continuing annuity. And as the testator intended, that the annuity to her sister *Elizabeth* should continue during *Elizabeth's* whole life, he certainly meant to devise a fee to *Sarah* who was charged with the payment of it. And this intention with regard to the present devise is strengthened by his being explicit in the former devise to *Clement Boreham* "For and during the term of his natural life; he paying thereout yearly and every year 40s. a year to *Robert Boreham*:" whereas he adds no such restrictive words to this devise to *Sarah*.

He said, it was not necessary to cite cases; because the principle is clear, (though they might differ in the application of it,) and all the cases prove it. However, he would mention one, in point: which was that of *Reed v. Hatton*, in 2 Mod. 25. a devise "To R. upon this condition, that he pay unto his two sisters 5 l. a year:" and the houses were worth 16 l. per annum. This was holden to be a fee: for, "if

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"If there be a *possibility* of a loss, (though not very probable that the devisee may be damnified,) it shall be construed a fee. If *A.* devise 100 *l.* per annum to *B.* paying 20 *s.* 'tis not likely that the devisee should be damnified; but 'tis possible he may." And judgment was given accordingly.

2d. Question—But supposing that we were to fail in this first point, yet as this is a mere *possessory* action, it is enough for the plaintiff, if she can *destroy the defendant's title*: it is not necessary, in a mere *possessory* action, for the plaintiff to set out a title, *unless* he is obliged to it by the defendant's setting out one in himself: which the defendant has *not* done in the present case. He says indeed in his rejoinder, "That the lord made a prior grant to *Thomas Ives*; whose heir conveyed to him." But this ought to have been *SPECIALLY* pleaded: whereas, here, he has only traversed the lord's GRANT to the plaintiff; by which traverse of the grant, only the *legal operation of the grant itself* is put in issue; not the title of the plaintiff. He can not, upon this traverse, go into the title of *Thomas Ives*, or give evidence of any thing foreign and extrinsic to the point in issue. If he would have done this, he should have pleaded the matter *specially*. But upon the *present issue*, the plaintiff could not tell how to direct his evidence: for, the defendant might as well claim under any other person, as under *Thomas Ives*. The defendant could no more go into title, upon this traverse, than he could have done upon the general issue. In *Hobart* 72. *Humberton v. Howgil*, issue was taken upon the seisin of *Thomas Howgil*: and the jury found "That *Thomas* had made a feoffment to *John Howgil*;" but added—"That it was made by *covin*, to defraud the plaintiff and other creditors." It was judged for the plaintiff: for, *Thomas* remained still seised, as to the creditors, notwithstanding the feoffment. But if the issue had been taken directly, "*Infeoffed or not infeoffed*," it had been found *against* the plaintiff. For, in that case, he must avoid the feoffment, by *covin specially* pleaded; for, it is a feoffment, *tiel quel*: as, you can not plead "*Non est factum*" generally, upon the statute of usury, or the statute of sheriffs. But here (says the book) the issue is *general*, "*Seised or not seised by the feoffment*;" and therefore the *covin* may be given in evidence, when the feoffment is given in evidence. So in the present case, the issue being taken on the grant, it was enough for us, to prove the admission, as stated in our replication: which we did prove. If the defendant could have invalidated it, that ought to have been done by *special* pleading.

Mr. Ashhurst, contra.

1st. The

1st. The intention of the testator is indeed a general rule for the construction of wills, in cases where it is plain and clear and positive and excludes every other implication: but an heir at law shall not be disinherited without an absolute necessary implication. *Vaughan* 262. *Gardner v. Sheldon*.

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It is true, that where the devisee is charged with the payment of a sum in gross, he shall have a fee, though the estate be not devised to him, "and his heirs:" but if it be an annual payment out of the thing devised, it will not create a fee, without apt words; because the devisee can not lose by the devise. This distinction is laid down in *Cro. Car.* 158, 159. *Ansley v. Chapman*, and in *Collier's* case 6 Co. 16. And here the value of the thing devised is 5 l. 6 s. per annum; and the charge is only 40 s. per annum. So that the devisee may pay it out of the profits, and is sure to have no loss. And *Collier's* case is most expressly in point, "That this is but an estate for life." But the very words of this will are as explicit as possible—"She paying THEREOUT." Which circumstance distinguishes this case from that of *Reed v. Hatton*, where the words only were "That he pay unto his two sisters 5 l. a year;" (not saying, "Out of the profits.") possibly, that case might have been so circumstanced, that the devisee stood a chance of being a loser: here, she certainly could not. In the former devise to *Clement Boreham*, the testator expresses his intention "That it should be only for his life:" and the two clauses being exactly similar, must be construed both alike. There is nothing in this will, from whence it can be inferred that the testator intended that the annuity which *Sarah* is to pay to *Elizabeth Boreham* should continue during *Elizabeth's* life. The contrary seems rather to be implied: for, the testator gives a like annuity to his grandson *Robert Boreham*, in the same words, out of *Clement Boreham's* house which he has expressly devised to *Clement* for life only. And it does not clearly appear, that *Robert Boreham* who was to have a share in the reversion after *Clement's* death, was the same person as *Robert Boreham* the annuitant.

2d Question—It is objected, that upon this traverse, nothing but the effect of the grant can be controverted.

But the pleading in cases of copyholds is different from the pleadings in cases of freeholds. A copyholder has, in the eye of the law, only an estate at will; and in pleading, he may alledge an admittance as a grant. But the lord is only an instrument: he can only transfer an estate according to the surrender and according to his authority. He can not vary in person,

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person, estate, tenure, or in any other collateral points: if he exceeds his authority, his admittance is good only *pro tanto*. *Coke's Complete Copyholder*, p. 52, 53. § 41.

Now if *Sarah Boreham* was (as we say she was) only tenant for life, she then had no estate which she could devise at her death: but immediately upon her death, the heir of the testator *Thomas Ives* became intitled to the reversion. Consequently the admission of the plaintiff and her sister *Ellen* (mentioned in the replication) of the 3d July 1754, is in effect a grant of *nothing*. The defendant in his rejoinder therefore *denies*, that the lord then *granted* the estate in manner and form as is alledged by the replication; and shews a title in himself, inconsistent with it. He was obliged either to admit that title, and derive under it; or to *traverse* it. And having traversed the plaintiff's, he properly sets up his own. This admittance was *not* in fact, a grant of the thing itself: it is incumbent upon the plaintiff, to shew that it amounts to a grant in point of law.

The case of *Humberton v. Howgil* in *Hob.* 72. is distinguishable from this case: for, there the feoffment was not void, but only *voidable*: it would operate between the feoffor and feoffee, though not to defraud creditors. But where the feoffment is absolutely *void*, it may be given in evidence upon a plea of *non feoffavit*: *Bro. Abr.* title *General Issue* p. 73. expressly. So, if a bond is *void*, (as the bond of a *feme-covert*,) this may be given in evidence, upon "*Non est factum*" pleaded: but *not* where *voidable* only, (as the bond of an infant.) So here, the admission is a nullity; it is *no grant at all*; (for the party admitted had *no right* :) therefore the defendant may with propriety say, "That the lord made *no* such grant."

As the plaintiff, being a *copyholder*, could not plead a title, but could only plead it as a grant from the lord, the defendant could only traverse the grant.

Mr. Leigh, in reply—

1st. Insisted that the charge of the annuity to *Elizabeth* might have continued *longer than Sarah's life*: and therefore the devise might have been *prejudicial* to *Sarah*, instead of *beneficial*, if it was to be construed only a *life-estate*. And he relied upon the case of *Anstey v. Chapman*, in *Cro. Car.* 157. (which, he said, proved strongly for him;) and on that of *Reed v. Hatton*, in 2 *Mod.* 25. and also now added another, *Lee v. Stephens*, et al. 2 *Show.* 49. where a devise to *James*, conditionally, "That he shall allow to *Nicholas* meat, drink, apparel,

"apparel, washing, and lodging during his natural life," was adjudged a fee. So the present devise was intended, he said, as a provision for both sisters; and it was not meant that the annuity should cease upon the death of *Sarah*; and it was payable out of the estate, not out of the rents and profits. In that case of *Lee v. Stephens et al.* *Pemberton* took a diversity between those cases where the money to be paid was somewhat granted and secured before the death of the testator; and those where the charge is laid by the testator on the devisee.

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2dly. The defendant could not put the plaintiff to shew any other title than the grant of the lord. In a possessory action, a defendant can not drive a plaintiff to shew a title, without first shewing one in himself.

The difference of pleading, in case of freehold and in case of copyhold, is only in point of form.

This grant of the lord is *not void*. And the defendant not having pleaded any bar to it, he can not give any in evidence. This grant cannot be compared to the bond or to the feoffment of a feme covert: for, they are absolute nullities; but this is not.

The case of *Humberton v. Howgil*, in *Hob.* 72. is in point.

LORD MANSFIELD was gone; and Mr. Justice DENISON absent: and the other two judges having some little doubt on the first point, though none on the second, took time till Monday to consider of it. And on Monday the 9th of July,

Mr. Justice WILMOT declared their opinion in favour of the plaintiff. He premised, that there was an apparent inconsistency in the state of the case, as it stands drawn up for the opinion of the court, for, upon the face of the stated case, it appears that *Thomas Ives* the devisor left a daughter and grand-daughters; and that the plaintiff is grand-daughter to him; and that the title is in her as his heir at law, or at least can not be in the defendant as claiming under *Thomas Ives* as his heir at law: for, *Sarah's* mother, *Elizabeth Boreham*, was the testator's own daughter; and here is no mention of any custom to exclude females; nor did he ever hear of such a custom, he said, in any manor. And yet it is admitted upon the case, "That *John Ives*, the testator's brother, was his heir according to the custom:" and the defendant claims under him as being so. But if in fact he was not so, there seems to be an end of the defendant's pretensions.

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However, two points are, by the case, submitted to the opinion of the court :

1st. Whether *Sarah Boreham* took an estate in *fee*, or for *life only*.

2d. Whether (in the latter case) the defendant could take advantage of it, upon *this* issue joined upon *these* pleadings.

On the 1st point, he owned that he had, at first, had some doubt : but that doubt was removed.

The plaintiff, at the trial, derived her title under the will of *Thomas Ives* ; who, after having surrendered to the use of his will, devised to *Sarah Boreham* in *fee*, (as the plaintiff insisted :) which *Sarah Boreham* was admitted, and surrendered to the use of her will, and devised the estate to her sister *Elizabeth Boreham* in *fee*. *Elizabeth* married *Baddeley* ; and had two daughters by him, viz. the plaintiff and her sister *Ellen*, who took as coparceners, and were admitted accordingly ; and on *Ellen's* death, her moiety descended to the plaintiff ; and she was admitted to it, and so became sole seised.

But the defendant insisted that *Thomas Ives's* devise to *Sarah Boreham* gave her nothing more than an estate for *life* : and consequently, she had no power to devise. And he makes his claim under the heir at law (as he is stated to be) of *Thomas Ives* the deviser.

The plaintiff's counsel insisted that the devise to *Sarah Boreham* must be construed to be a devise in *fee* : but even if it was not so, but only a devise to her for *life*, yet that the *fact* of the grant to the plaintiff and her sister *Ellen* was the only matter now in issue ; and the defendant could not, under *these* pleadings, take advantage of the plaintiff's want of title.

The first question is the material point : and we are of opinion " That *Sarah Boreham* took an estate of inheritance."

The short of the case is, that *Thomas Ives*, being seised of a house and of two copyhold tenements, and having a daughter and several grand-children, made his will, and devised the house to *Clement Boreham* for his *life*, he paying thereout 40s. a year to *Robert Boreham* the testator's grandson ; and after *Clement Boreham's* decease, to be equally divided between *Robert*, *Sabill* and *Jeremiah Boreham*, the children of *Robert Boreham*

Boreham deceased, (who were his 3 grand-sons :) and he gives his two copyhold tenements to *Sarah Boreham*, the paying THEREOUT 40s. a year to her sister *Elizabeth Boreham*. Then he gives 40 l. to two grand daughters, *Anne* and *Mary Boreham*, and makes several other bequests.

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Mr. Justice WILMOT, after having thus stated the will, laid down this general position—"That the intention of a testator is to be collected from the whole of his will, *ex visceribus testamenti*; so as to leave the mind quite satisfied about what the testator meant: and as a will of lands must be in writing, such collection of the testator's intention must be founded upon the writing itself."

THIS is the principle. The only difficulty is upon the application.

Particular cases serve rather to obscure and confound, than to illuminate questions of this kind: and no case in the books exactly tallies with the present. Therefore the gentlemen who have argued this case have acted very properly in mentioning only a few; and have rightly put it upon the intention of the testator.

Now I collect that intention (he said) first, from the devise to *Clement Boreham*; and then, from the devise to *Sarah Boreham*.

He devises to *Clement*, expressly, "For and during the term of his natural life; and, after his decease, to *Robert*, *Sabill*, and *Jeremiah Boreham*." But in the devise to *Sarah*, he omits the words "For and during her life:" which words it must be supposed he would have inserted, in case he had intended to give her only an estate for life; because he had just before done so, in the preceding devise to *Clement*. It is plain, that by giving it to her generally, without having any such restrictive words, as he had before added to his devise to *Clement*, that he meant to give her the absolute property: he meant to devise it *ut bona et catalla*; as a man unacquainted with the law might very naturally do. And his making no limitation over, in this devise to *Sarah*, is an additional and auxiliary proof of his intention to give it to her absolutely. But the material circumstance is the condition he has annexed to her estate, of paying an annuity to her sister *Elizabeth Boreham*.

It is objected, "That he has expressly directed the 40 s. a year to her sister *Elizabeth* to be paid THEREOUT:" and it is urged, "That this is equivalent to making it payable out

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"of the RENTS AND PROFITS." And I think it is so. Therefore this is *not* to be considered as a charge of a payment of a sum of money *in gross*. But, by a subsequent clause, he gives 40*l.* (to wit 20*l.* apiece) to two *other* grand-daughters, *absolutely*. Therefore he probably meant that *this* grand-daughter Elizabeth Boreham should have her 40*s.* a year upon the *same* foot; and that the provision he had thought proper to make for her should be a *lasting one*, to *continue during her life*, and *not*, that she should be left to starve, in case her sister Sarah should happen to die before her;* and consequently he must have intended, that the annuity which Sarah was to pay to her sister Elizabeth should be an annuity *during the life of Elizabeth*. And if so, then it follows, that this charge of 40*s.* a year to Elizabeth is just the same thing as *devising an annuity to her*; though it is put in the form of a condition. And Mr. Ashurst very candidly admitted, that if this was an annuity *for life* to Elizabeth, it would make it a devise in fee to Sarah. And as this could not be effectuated without construing the inheritance to be given to Sarah, it raises a very violent presumption "That the testator intended her an estate of inheritance." He just mentioned, in delivering this part of his opinion, the case of *Shaw and Weigh*.

But the case that comes *nearest* to the present, he said, though not exactly up to it, is that of *Read v. Hatton*, 2 Mod. 25. Where the estate was given "Upon this condition, that the devisee pay unto his two sisters five pounds a year:" and here, the words amount to a condition "That she pay her sister 40*s.* a year." Indeed that will did not direct it to be paid "Thereout," as this does: but that was a devise upon a condition to pay the annuity; (for the words there printed in a different letter from the rest of the case seem to be the very identical words of John Thatcher's will.) And judgment was there given for the defendant: for that "The estate being limited to the devisee, and charged with payments to the sisters during their lives, doth plainly prove the intention of the testator was, that the devisee should have an estate in fee-simple."

Mr. Ashurst endeavoured to answer this case by that of *Ansley v. Chapman*, in *Cres. Car.* 157. Where William Lock, being bound in an obligation "That 40*l.* should be paid annually to his wife during her life," made his will, and devised to his sons; and added, that his devise to them was to this purpose, "That they all shall bear part and part-like, going out of all his houses and lands, towards the payment of my wife's 40*l.* per annum during her life, which I am bound to pay: and which of my sons refuse to bear their part, I will that he or they shall enjoy no part of my bequest given unto them; but my gift given unto them shall go to the rest of my well-willing sons."

The

The true answer to that case is, that the charge to the wife is not imposed by the will; but the will gives it an additional security; for, the testator stood previously bound to pay the annuity.

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Mr. *Ashurst* also contended, that the annuity payable to *Elizabeth Boreham* would determine upon the death of *Sarah Boreham*, the devisee; in the same manner as *Robert Boreham's* annuity would determine upon the death of *Clement*.

But *Clement's* death only changed *Robert's* annuity into an interest in a third part of the estate: for, *Robert Boreham* the annuitant upon *Clement*, and *Robert Boreham* one of the three reversioners after *Clement's* decease, seem to be the same person. But if not, yet still there is a great difference between the two devises. The devise to *Clement* was expressly for his life: the devise to *Sarah* had no such restrictive words. I think the testator did not intend that *Elizabeth's* annuity should drop with *Sarah's* life: * IF he had intended that, he would have expressed himself otherwise than he has done.

* Vide post.
See p. 1542.
in margine.

At all events, the plaintiff seems intitled to the estate.

On the 2d. point—The case is extremely clear. It depends upon the nature of copyhold estates.

FORMERLY, copyhold estates were mere tenancies at will; a middle estate between freeholders and villains: at length, they acquired stability, by custom. The lord is not intitled to his fine, till admittance: but the admittance is merely * form. On a surrender of a copyhold, the estate remains in the surrenderer, till admittance. The lord, by the custom, has only a customary power to make admittance secundum formam et effectum sursum-redditionis: and therefore it is not like the case of feoffees to uses, at common law. And although the lord grant the land over by copy to another, this is all without any warrant: for, notwithstanding this, the lord may make admittance according to the surrender; and this shall be good; and he who is admitted shall be in, by him who made the surrender. The estate must be according to the surrender, and not according to the admittance. This is a known and common doctrine; and is laid down fully, in *Coke's Copyhold Cases*, 4 Co. 28. b.

* V. post.
Noden v.
Griffiths et al.
18th November
1766. accord.

The present admittance was upon a descent: for, the plaintiff and her sister *Ellen* held in coparcenary. The defendant could traverse nothing here, but the grant which the plaintiff

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had alledged in her replication. And if she was *not* heir, the admittance of her, as such, is *void*.

He then stated, at large, the case of *Humberton v. Howgil*, in *Hob.* 72. and observed that there is a material difference between a *feoffment* and a *grant*. In a *feoffment*, the *livery* is the material part, and transfers the possession. If another person was in possession, both the *feoffment* and *livery* would be void; even though the *feoffment* was by deed. And Mr. *Asbhurst's* case (cited out of *Bra. Abr.* General Issue 73) applies to this, "That where a *feoffment* is *totally void*, it may "be given in evidence upon a plea of *non feoffavit*."

"*Non concessit*" puts the OPERATION of the grant in question. If a man pleads a grant from the crown under the great seal; and the other pleads "*Non concessit*;" in this case the *letters patent* are confessed; but the effect and operation of them is denied: the effect of that issue of "*non concessit*;" is, that the crown *had nothing* in the land; or, that the tenements *did not pass* by the letters patent. So is *Hynde's* case in 4 Co. 71 b. and *Eden's* case in 6 Co. 15 b. expressly,

A grant without right is *absolutely void*.

If *Sarah* took a *fee* under the will, then the admission of the plaintiff in *fee* is good, and all is right: but if *Sarah* took only an estate for *life* under the will, then the grant to the plaintiff was void, and the grant to the defendant *Leppingwell* would be *substantiated*; he claiming under the heir at law of the testator; and *Leppingwell* would not, in *that* case, be a wrong-doer.

Therefore if it had rested on *that*, I should think that the *validity and operation* of the grant *would* have come in question upon this issue,

On the other hand, IF she took an estate of *inheritance* (as we hold that she did,) this totally varies the case. For, then the plaintiff had a *good* title under her devise and the subsequent descent; and *Leppingwell* could have *none* under the heir at law: and *possession alone* would be sufficient for her to maintain this action against *Leppingwell*; though it would *not* have been so, in case the *real title* had been in *Leppingwell*.

RULE—

That the *possession* be delivered to the PLAINTIFF,

Bidlefon,

Bidlefon, Esq; Administrator &c, *versus* Whytel, Esq;

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(1 Black. Rep. 506. S. C.)

Tuesday 10 July 1764.

No bail requisite in error, on judgment in debt, upon a prior judgment.

UPON Monday the 8th of November 1762, the following question came before the court, (upon an adjournment over from the preceding Trinity term;) viz. "Whether the plaintiff in a writ of error brought upon a judgment obtained in an action of debt commenced in this court, (upon a former judgment obtained here by the administrator-plaintiff's intestate, in an action of debt upon a bond conditioned for payment of money only, (which former judgment was CONFESSED by warrant of attorney,) was or was not obliged to put in BAIL on suing out such writ of error; upon the statute of 3 J. 1. c. 8:" (For it was agreed not to be within the statutes of 13 C. 2. st. 2. c. 2. or 16, 17 C. 2. c. 8. which extend only to writs of error after verdict.)

The rule was upon the administrator-plaintiff, to shew cause why the return of the writ of *capias ad satisfaciendum* issued in this cause should not be set aside, and the proceeding against the bail of the defendant stayed, with costs to be taxed by Mr. Owens; and in the mean time, further proceedings to be stayed.

The case was this, as to the facts—The administrator-plaintiff's intestate had brought an action of debt in this court, for 350*l.* upon a bond conditioned for payment of money only; and obtained judgment for the penalty, by CONFESSION, upon a warrant of attorney given for that purpose; (so that there was no bail then put in;) and afterwards died. Then his administrator (the now plaintiff) brought a second action of debt, in this court, grounded upon that former judgment obtained by his intestate: to which second action the defendant put in bail; and then pleaded "That the intestate had not bona notabilia &c: and therefore the prerogative administration was void." This plea was over-ruled on demurrer; and the administrator thereupon had judgment.

Upon this second judgment, the defendant brought the present writ of error: WITHOUT entering into such a recognizance as is required by 3 J. 1. c. 8. The attorney for the plaintiff (the administrator) conceiving that execution was not stayed by this writ of error, for want of such a recognizance, proceeded to get the *ca. sa.* returned, and went on against the defendant's bail, in the same manner as if no writ of error had been brought. And the question was "Whether he was or was not REGULAR in so doing."

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The words of 3 J. 1. c. 8. (intituled "An act to avoid unnecessary delays of execution") are "That no execution shall be stayed or delayed upon or by any writ of error or *supersedeas* thereupon to be sued, for reversing any judgment in any action or bill of debt upon any *single bond for debt*, or upon any obligation with condition for the *payment of money only*, or upon any action or bill of debt for *rent*, or upon any *contract*, sued in any of his Highness's courts of record at *Westminster*, or *&c.*, *&c.*; unless such person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties *&c.* shall first *&c.* be bound *&c.* by recognizance *&c.*, to prosecute with effect *&c.*, and also to satisfy and pay *&c.*, all and singular the debts, damages and costs upon the former judgment and all costs and damages to be also awarded for the same delaying of execution."

Mr. Solicitor General, Sir *Fletcher Norton*, on behalf of the plaintiff in error, argued, that he was *not* obliged to enter into any recognizance, in the present case; and that the writ of error (when allowed) being a *supersedeas* at common law, the plaintiff's *subsequent* proceedings were consequently *irregular*, and must be set aside as being so: for, this was not within any of the 4 cases specified in 3 J. 1. He confined himself to *this* statute: for that it could not, he said, be within either 13 or 16 C. 2; because it was not after verdict. And he cited 2 *Bulstr.* 53. *Gilling v. Baker*, as an authority for him upon the *reason* of it; where Mr. Justice *Dodderidge* says "That debt for arrearages of an account before auditors is clearly out of this statute; for, this is a debt grounded upon record." Now, so is the present debt a debt grounded upon record.

He added, that this statute of 3 J. 1. had been always construed *strictly*, and *never extended by equity*: and he urged, that there was the less reason for it in the present case, because an action of debt brought upon a former judgment is a hard and oppressive action, and ought not to be encouraged.

Therefore he prayed to make the rule absolute.

Mr. *Stowe* and Mr. *Wallace*, *contra*, on behalf of the administrator, (who was plaintiff in this court, and defendant in error,) agreed that the case was *not* within the statutes of 13 & 16 C. 2. because there had been *no verdict*: but they insisted, that the plaintiff in error was *within* 3 J. 1. c. 8. And that the plaintiff's proceedings were not stayed, for want of the *recognizance* which ought to have been entered into as is directed by that statute.

They

They said, that this was an action *upon a CONTRACT*; and that the *practice* was to enter into such recognizance, upon suing out a writ of error to reverse a judgment in an action of debt upon a former judgment: and they cited and relied on two cases, viz. 1 Lev. 260. Sir Theophilus Biddolph v. Temple, and Lucas 281. Hammond v. Webb, B. R. Hil. 1 G. 1.

They denied, that this act ought to be construed *strictly* and not *equitably*: and they denied, that there was any vexation at all in *this* case; because the original plaintiff being dead after the first judgment, the administrator was *obliged* to institute *some* process to revive it; and *this* method was *safer* than a *scire facias*, which might have occasioned the defendant to run away, and then the plaintiff would have had no bail at all, as there was none in the first action, where the judgment was *confessed*.

Sir Fletcher Norton observed upon the case in 1 Lev. 260. That if it was not a contract in its original nature, it could not be *made* so by the judgment of the court.

THE COURT desired to be informed of the PRACTICE; for they thought it a case that must very frequently occur: and they directed the master to inquire into it.

To which end, it was, for the present, ADJOURNED.

Upon Wednesday 26th of January 1763, Lord MANSFIELD communicated to the bar, and particularly to the counsel concerned in this case, that this matter had been considered by the court, and been very carefully looked into during the recess, particularly by Mr. Justice Denison; and that it appeared to be a *vexata questio*; and had been *differently* determined; viz. in 10 Ann. B. R. "That there should be no bail: and in 2 G. 1. C. B. temp. Lord Ch. J. King, "That there SHOULD BE bail:" so that there were, upon the same point, *contrary* resolutions of the two courts.

Therefore this court intended now to consult *all the judges*: because it is a very wrong thing, to have *different* rules in different courts, upon the *same* act of parliament. He said, that it had been *agitated* in C. 2. time; but not *determined* till 10 Ann.

Cur. advisare vult.

Lord

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Lord MANSFIELD now delivered the opinion of the court upon this case: declaring, at the same time, that the opinion of *all the judges* had been taken upon it.

He premised, that there was no doubt but that, in the present case, the *original* action required bail. But “Whether there ought to be *bail on the writ of error* brought upon the *second* judgment, or not,” there had been different opinions in the two courts, of *king’s bench* and *common pleas*: the court of *king’s bench* had been of opinion “That *bail was not necessary*,” the *common pleas*, “That it *was*.” This court held it *not* to be necessary, in a case between *Goodwin and Goodwin*,* in the 10th of *Queen Anne*: and this was on full consideration, But the court of *common pleas* were of a different opinion, in a case which came before them in Lord Ch. J. King’s time, between *Lepson and Anderson* in the 2d of King G. 1. There had been judgment in that court, in an action of debt on a *mutuatus*, brought there. An action of debt was brought upon that judgment: and the plaintiff obtained judgment in that *second* action. Upon that *second* judgment, a writ of error was brought: and the question before them was “Whether there should be bail given upon bringing that writ of error.” It was objected, “That the statute of 3 J. 1. c. 8. does not extend to writs of error brought upon actions of debt on judgments;” and it was urged, that the statute ought to be *literally* construed; and that the *practice* was so. The court of *common pleas* held, “That the *CONTRACT* was the *foundation* of the whole; and that if bail might be required in the *first* action then there ought to be bail given upon bringing the writ of error: and therefore they were of opinion, in that case, that bail *ought* to be given.” And they took notice, that the *practice* was *not settled*: for, this court did *not*, in such cases, require bail; but they *did*.

ALL the judges *now* hold “That bail is *NOT* requisite, upon bringing a writ of error upon a judgment in an action of debt founded upon a *prior* judgment.”

For they hold—1st. That the *contract* is *EXTINGUISHED* by the first judgment. 2dly. That a *judgment* is *NO CONTRACT*, nor can be considered in the light of a *contract*: for *judicium redditur in invitum*. 3dly. Another reason why bail can not be insisted upon is, that an action of debt upon a judgment is an action of a *SUPERIOR nature* to an action of debt upon bond, or any of the other actions particularly specified in this statute of 3 J. 1. and therefore shall *not* be included

* See S. C. but not S. P. in Viner’s Abridgement, title bail, letter L. p. 34.

included in it; agreeably to the reasoning used in the archbishop of *Canterbury's* case in 2 *Rep.* 46 b. "That if the makers of the statute had intended that it should have extended to this action of a superior nature to those which are specified in it, they would have begun with it, and would have mentioned it prior to those of an inferior nature." 4thly. Another reason is, that this statute ought rather to be taken literally, than extended. There was a case of *Taylor v. Baker*, in *M.* 29 *Car.* 2. *B. R.* (reported in 3 *Keble* 802.) where *Holt*, upon this statute, prayed bail in error upon a judgment given in an action of debt on judgment: but Mr. Justice *Wild* said, "That this statute extends not to executions, nor to judgments; but ought to be literally taken; especially, the practice ever since having been not to put in bail; and the enumeration is only of debts of an inferior nature."

If it should be thought strange, that bail should be required when the action is only upon a contract, and should not be required when the action is upon a judgment, which is of so much higher a nature;—The answer is, "That in the former case, the legislature have required it; in the latter, they have not;" unless a judgment could be esteemed a contract, (which we think it can not.)

This is therefore a *casus omissus*: and the statute is not to be extended by construction; because actions of debt on judgment are, in general, oppressive; though there may be some particular cases where they may fairly be accounted for.

For these reasons, all the judges are of opinion, "That though in the original action bail was requirable, yet it ought not to be required on writs of error upon actions of debt brought on such judgments."

So that this point is now settled for the future.

The RULE * therefore for setting aside the return of * *v. ante*, p. the *ca. fa.* and staying proceedings against the bail, 1545. must be made ABSOLUTE; but not with costs.

V. post, 1566. (the first case of next term, *Trinder v. Watson et al.*)

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(1 Black. Rep.
507. S. C.)Tuesday 10 July
1764Insurance free
from average,
unless general;
does not extend
to damage to
the goods in a
storm.Wilson and Another *versus* Smith.

THIS was an action on the case brought upon a *policy of insurance*, for the recovery of 56*l.* 19*s.* and 8*d.* *per cent.* being the damage received by a cargo of wheat on board the *Boscauwen*, insured at and from *Lancaster* to *Rotterdam*: which wheat was valued, by agreement, at 30*s.* *per* quarter. The policy was in the ordinary form. The premium was 5 guineas *per cent.* and in case of loss, the assured to abate 2 *per cent.* And the assurers to be free from average under three pounds *per cent*; *UNLESS general, or the ship shall be stranded.*

The policy was thus underwritten—

“ N. B. Corn and fish are warranted free from average, *UNLESS GENERAL, or the SHIP be STRANDED.*
“ Sugar, tobacco, hemp, flax, HIDES and skins are warranted free from average under five pounds *per cent*; and all other goods, free from average under three pounds *per cent*; unless general, or the ship be stranded.”

Warranted well in port the 16th day of *February* 1760.

The defendant underwrote this policy for 100*l.* on 20th *February* 1760.

The defendant having pleaded the general issue, the cause came on to be tried at *Guildhall, London*, on the 15th of *February* 1764, before Lord *Mansfield*.

The ship, with her cargo, being wheat belonging to the plaintiffs, sailed from *Lancaster* the 21st of *February* 1760.

After her departure from *Lancaster*, and before her arrival at *Rotterdam*, to wit on the 22d. day of *February* 1760, sailing and proceeding on her voyage, she met with a violent storm, and was by and through the force of winds and stormy weather obliged to CUT AWAY and LEAVE her CABLE and ANCHOR, for the safety of the ship and cargo; and was also greatly damaged, and obliged to run to the first port (being *Liverpoole*) to refit; and that the expence of refitting the ship amounted to 38*l.* 15*s.* *per cent.*

That the hatches of the said ship were not opened at *Liverpoole*; but the ship, being refitted, on the—day of *February* 1760, sailed

failed from *Liverpoole* for *Rotterdam* with the cargo, and arrived there on the — day of *February*, and there landed her cargo of wheat.

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That upon unloading the wheat, it appeared that it *had received damage by the said storm*, to the amount of 56*l.* 19*s.* 8*d.* *per cent.*

The SINGLE QUESTION was (upon the true construction and meaning of the words "*free from AVERAGE, unless GENERAL, or the ship be stranded,*") "Whether the plaintiffs can, under the circumstances of this case, recover in this action, for the damage of 56*l.* 19*s.* 8*d.* *per cent.*" (the 38*l.* 15*s.* *per cent.* not being disputed.)

On *Friday* 25th. of *May* last, Mr. *Dunning* argued for the plaintiffs, the insured: and Mr. *Morton*, for the defendants, the under-writers.

Mr. *Dunning's* argument tended in general, to shew that these words amounted to a CONDITION; which condition would render it free from average, unless in two events, viz. a general average, or the stranding of the ship: but if either of these two events happened, then to be liable to average. Whereas Mr. *Morton* endeavoured to shew, that they ought to be considered as an EXCEPTION only; viz. to be free from average in all other cases but these two.

Both agreed in the fact; "That a storm arose; and that the ship was obliged to cut away her cables and leave her anchor; and that the wheat was greatly damaged; and that the average loss on the wheat would amount to a large proportion *per cent.*"

Neither side cited any common-law cases.

Mr. *Dunning* said, that this clause now in question as to its construction and meaning, was first introduced about the year 1749: before which time, he said, insurers were liable to every injury that happened to the goods insured. This clause, or memorandum was introduced, he said, to deliver the insurers from small averages; and was thought to be a better method of attaining that end, than adapting the premium to the nature of the commodity, as it might happen to be more or less liable to perish or suffer; (which method would

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would have made the policy too complicated ; and which the Dutch had at first tried, but afterwards altered.)

He said that both the insurer and insured ought to resort to the *body* of the policy : from whence the meaning of the parties would appear to be " That no average under 3 per cent. should be demanded upon *some* commodities ; nor under 5 per cent. upon *others* ; and that *corn and fish* should be subject to no average at all, (as being more perishable and damageable commodities,) UNLESS in one of two cases, viz. where there should happen a *general one*, or that the *ship be stranded*."

GENERAL average must arise from some act done to avert great danger, or some distress, where part is destroyed, to save the whole ; and therefore *all* ought to contribute.

Here was a *general average*, within the true meaning and intention of this policy. Ordinances of France 1681 lib. 3. c. 7. p. 81. Here, *one*, of the events has happened ; namely, a general average : and therefore the warranty "*free from average*" can not take place at all, in this case.

Mr. Morton argued that the meaning and intention of this policy was, that the insurers should not be answerable for any *partial* loss or damage to the goods insured.

The words in question carry a plain and obvious sense ; and are an *exception* out of the contract. Their construction stands upon its own bottom.

A *general average* is a general contribution of the owners of the goods on board, (where part is destroyed, to preserve the whole,) in proportion to their concern. If another man's goods had been thrown over-board to save the whole cargo, the owners of the wheat must then have been liable to *general average*, in proportion to the value of their wheat. If the ship had been stranded, the insured might have abandoned. Upon a *general average*, the insurer stands in the place of the owner of the goods : and upon a *total loss*, he is intitled to what may be saved. An average is a contribution by *non-sufferers*, towards the loss of those who *have* suffered for the preservation of the whole. But there is nothing in the present case that can render the insurers liable to an average of 57 per cent. on this wheat thus insured by them. They are liable *only* to the general average arising from the loss of the cable and anchor : they can not be liable to a DOUBLE general average.

Mr.

Mr. *Dunning*, in his reply, observed, that this could not be considered as an *exception*; because it was *not* part of what had been before specified.

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Ulterius Concilium.

This case was argued a second time, on *Tuesday the 26th. of June 1764*, by Sir *Fletcher Norton* (attorney general) for the plaintiffs, and Mr. *Serjeant Burland* for the defendant.

Sir *Fletcher*, first observing that, strictly, the plaintiffs would be *intitled* to recover upon the *general average*, yet acknowledged that the question meant to be left to the court turned only upon the construction of the words in the N. B. at the bottom of the policy, "Free from average, *UNLESS* *general* or the ship be stranded."

And he contended, that the true construction must be this—"That wherever there is a general average, or in case "the ship be stranded, *all other partial averages* should (if "either of *those two events happened*) be let in, upon these "perishable goods; just as if there had been *no* clause of "freedom from average, at all." Such clause meant nothing more, he said, than to guard the insurer against such *inherent* loss as might arise from the *nature* of the commodity insured. It means, that the insurer shall be free from all such petty losses too, as necessarily arise in the course of the voyage.

But it can never mean to discharge the insurer from *special* injuries by storms and winds, or from *all* average-losses arising within the *ordinary perils* of the voyage; or that, where there is a general average which the ship-freight and cargo must all be contributory to, he should *only* be liable to *that*, be it ever so trifling and inconsiderable. For this would be no insurance at all: the under-writer would, according to this *narrow* construction, run little or no risque, upon an insurance of perishable goods.

He asserted, that the practice of merchants and the determination of courts of justice were (both of them) agreeable to the construction that he contended for: and moreover, that the *premium* taken upon these insurances bore proportion to this greater risque.

He mentioned a case before Lord Ch. J. *Ryder* in 1754, between *Cantillon* and *The London Assurance Company*, upon

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an insurance of corn, with such a clause as this is: and, the ship being stranded, the plaintiff (the insured) recovered an average-loss of about 80 per cent. For, Lord Ch. J. Ryder and a special jury looked upon this as a *condition*; and that by the ship's being stranded, the insurer was let in to claim his *whole partial* average-loss. After which determination, *that company* (he said) had altered that clause in *their* insurances, by *omitting* the words "Or the ship be stranded."

Where the ship is stranded, the damage may happen to be such as would render it *impossible to distinguish* how much of it arises from the stranding of the ship; and how much of it, from the perishable nature of the commodity.

Mr. Serjeant *Burland*, *contra*, on behalf of the defendant, contended, that these words were to be construed as an *EXCEPTION*, not as a condition: the insurer is not to pay *any* average *at all*, unless in case of a *general calamity*. It is a general discharge from *all* average whatsoever, *except* in the *two* cases particularly specified: (which two specified cases are quite distinct and unconnected.)

The general contribution, and particular average have no connexion with each other.

The stranding of the ship is considered as a *total* loss: and the insured may abandon.

He alledged, that the *premium* was paid in proportion to *his* construction; and *not* to Sir *Fletcher's*.

Sir *Fletcher*, in reply—With regard to the *premium*—The premium here taken was adequate to the common and ordinary premium; therefore so also ought the risk to be. Whereas, upon *their* construction, the under-writer would be upon a *better* and *more* advantageous foot, upon insuring perishable goods, than upon insuring bale-goods, though the *premium* he receives on each is the *same*.

Here *is* a connexion between the average-loss in particular, and the general average: for, the *same* storm that occasioned the general average, was also the occasion of the *particular* damage.

Thus far indeed is true, but no further; "That we could have had no claim to any average at all, *unless* one of two specified

"specified cases had happened." But as one of them *has* happened, we are thereby *let in* to claim *particular average*.

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The CASE was ordered to stand over for the opinion of the court.

And on this 10th. of July 1764—

LORD MANSFIELD delivered it, to the following effect.

After having stated the case, he repeated the observation and argument insisted upon by the counsel on the part of the plaintiffs, "That the warranty to be *free from average* ought only to take place, *if neither* of the two specified events *should* happen: but *if either* of the two specified events *should* happen, (if either the ship should be stranded, or any thing should happen which created a general average,) then the warranty to be free from average was thereby *DISCHARGED*." For it was argued and insisted upon, by them, that the words were in the nature of a *CONDITION*.

BUT they are *not* to be construed as a *condition*, in the *sense* that the counsel for the plaintiffs would have it understood.

POLICIES of insurance, according to their present form, are very irregular and confused: an *ambiguity* arises in them from their using words in *different* senses; particularly, in the use of this word *average*.

It is used to signify a *contribution to a general loss*: and it is also used to signify a *particular partial loss*.

SIR HENRY SPELMAN, in his Glossary, under the word *averagium*, says, "It is detrimentum, quod vehendis mercibus accidit; ut fluxio vini, frumenti corruptio, mercium in tempestatibus ejectio: quibus adduntur vecturæ sumptus, & necessariæ aliæ impensæ. De averagiis mercium & navibus projectarum, distribuendis, vetus habetur statutum, non impressum, cujus exemplar apud me extat." (For my own part, I never met with that statute.)

Whether it be considered in *one*, or *other* of these senses, it will not serve the turn of the plaintiffs, in the present case. For, if it here signifies *contribution*, the insurer is to be free from contributing, unless where the contribution is *general*. If it signifies *loss*, then plainly it is warranted free from all *particular losses*. The insurer is *liable* to all losses arising from the ship being *stranded*, and in all cases where there is a *general*

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ral average: but all other *partial* losses are *excluded* by the express terms of the policy.

THE LONDON Assurance Company, do, in all *their* policies, *leave out* this clause about the *ship's being stranded*; and only say, "Free from average *unless general*."

The word "*unless*" means the same as "*except*"; and is *not* to be construed as a CONDITION, in the *sense* that the counsel for the plaintiffs would put upon the word "*condition*."

The words "free from average *unless general*," can never mean to leave the insurers liable to any *particular* average.

It is clear that the plaintiffs *ought not* to recover; and that the judgment ought to be for the defendant.

JUDGMENT for the DEFENDANT.

Harker et al. *versus* Birkbeck et al.

(1 Black. Rep.
432. S. C.)

Wednesday,
21 July 1764.

Trespass and
not case, lies
for encroaching
on a lead mine.

THIS was a special case from the last *Lent*-affizes for the county of *York*. The verdict was given for the plaintiffs: but

There was a rule, by consent, "That the verdict should be subject to the opinion of this court; and if that opinion should be for the plaintiffs, then they were to be at liberty to proceed upon it; if for the defendants, then the verdict to be vacated, and instead thereof, a nonsuit returned."

It was an action of trespass *upon the case*; wherein the plaintiffs declare, that whereas they were and still are *lawfully intitled to and ought to have and enjoy the SOLE LIBERTY AND PRIVILEGE of digging for getting and raising lead-ore, and taking the benefit thereof, WITHIN a certain place or plat of ground lying and being in Whiteside, East of the old field called Grena Field, bounded &c, as is particularly stated in the declaration*; the defendants well knowing the premises, but intending to injure the plaintiffs in this behalf and to deprive them of all the *benefit and advantage of GETTING AND RAISING LEAD AND LEAD-ORE within the said place or plat of ground within the limits abovescribed, and whilst the said plaintiffs were so lawfully intitled to get lead-ore there as aforesaid, did sink for raise and get a great quantity (to wit 100 ton) of lead-ore within the said place or plat of ground within the limits above*

above described, of the value of 200 l. and took and carried away the same, and converted and disposed thereof to their own use: whereby the said plaintiffs were DEPRIVED OF THE BENEFIT AND ADVANTAGE *which they might and otherwise would have made of their said LIBERTY and PRIVILEGE.*

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There was another count, containing the like recital and charging the like facts of sinking for raising and getting a great quantity of lead-ore within the said plat and within the limits above described; but omitting to charge taking carrying away and converting it to their own use: which count lays this as an *interruption* to the plaintiffs in the exercise of their said *liberty and privilege* there, of digging for getting and raising lead-ore; and thereby depriving them of the benefit and advantage which they might and otherwise would have made of their said *liberty and privilege.*

The defendants pleaded the general issue, "Not guilty;" and thereupon issue was joined.

The case stated and reserved for the opinion of this court was—

That *Mrs. Moore*, as executrix of her husband, was solely intitled to the mines and veins of lead and lead-ore within the limits mentioned in the declaration, for a *term of years* yet to come. That she had *no interest in the soil*, but for the purposes of *digging and searching for lead and lead-ore and working the said mines.*

That she employed one *Rosewarne*, as her agent: and that he, on *her* behalf, and the plaintiff *Harker*, on behalf of himself and partners, signed a writing upon plain paper without stamps, in the following words—16th. June 1761. Memorandum—"Mr. *Thomas Rosewarne*, agent to *Mrs. Frances Moore*, doth let or set to *John Harker* and partners, to raise lead-ore in a plat of ground lying and being in *Whitafide*, East of the old field called *Grena-Hill*. This plat of ground begins at a gill called or known by the name of *Long Gill*; and from *Long Gill Head* to *Pickersone Rigg*, which is the South-west boundary adjoining to the duke of *Bolton*: the North-east boundary of this plat of ground begins at a gill at the West end of *Birks* pasture, known by the name of *Will Anton Gill Head*; and from *Will Anton Gill Head*, to a boundary called or known by the name of *High Barle*, adjoining to the duke of *Bolton*; which is the North-east boundary of this plat of ground. *John Harker*

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"and partners do agree to pay to Mrs. Frances Moore, or
 "her agent, *every sixth pig* of lead, both at the ore-hearth
 "and slag-hearth: for which, Mr. Thomas Rosewarne doth
 "agree to let the above partnership have the said ground the
 "length of Mrs. Moore's lease she now has from the crown;
 "Mrs. Moore to find the above partnership a smelting-mill
 "in good repair, to smelt the ore the partnership shall
 "raise. Mr. Thomas Rosewarne or any other agent Mrs.
 "Moore shall appoint, shall have free liberty or leave to in-
 "spect the said workings, whenever they please. The above
 "partners not to cease working the above-mentioned ground
 "for the space of 2 months; unless hindered by water or
 "some other unavoidable accident. Mrs. Moore is to carry
 "one eighth part of this bargain."

It further appeared, that the plaintiffs have worked for and
 got lead-ore there; and that the defendants had *also dug*,
 within the limits mentioned in the declaration, for several
 times within the time mentioned in the declaration, to search
 for, and *thereout had RAISED lead-ore*: upon which, the plain-
 tiffs had brought this action against the defendants, for *dis-*
turbing the plaintiffs in their PRIVILEGE under the said writing.

The above writing was produced and read in evidence,
 WITHOUT SEAL or STAMP; being the *usual* manner of mak-
 ing agreements for lead-mines there.

The defendants insisted, "That the *present action* can not be
 "maintained: that if any action could be maintained in this
 "case, it should have been *trespass quare clausum fregit*."

A verdict was given for the plaintiffs, with a *trifling* da-
 mage; subject to the opinion of the court upon the follow-
 ing questions; *viz.*

1st. Whether the *above action* can be maintained;

2d. Whether the writing, *not being stamped*, could be given
 in evidence, to prove the plaintiff's right.

This case was first argued on *Friday* the 18th. of *May*
 last, by Mr. Clayton, on behalf of the defendants, and Mr.
 Walker, on behalf of the plaintiffs; and again, on *Tuesday*
 the 26th. of *June*, by Mr. Morton for the plaintiffs, and
 Mr. Wedderburne for the defendants.

Mr. Clayton, for the defendants.

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1st point—The distinction between trespass *quare clausum fregit*, and trespass *upon the case*, is, that where the act is itself immediately injurious to the plaintiff, he must bring trespass: but where it is so only in consequence, case is the proper remedy. Here, the plaintiffs were in possession: and if any injury was done them, it was an immediate injury to their possession. Therefore they ought to have brought TRESPASS, and not * case.

* For this distinction, See 2 Lord Raymond 1402. Reynolds v. Clarke; and in Howard v. Bankes esq; Mich. 1760. 1 G. 3. B. R. ante, p. 1114.

2d point—The plaintiffs could not claim any title, (either as lessees, or grantees or assignees,) but by deed: and this deed ought to have been STAMPT; and not being stamped at the time it was produced could not be received as evidence. 5 W. & M. c. 21. § 3. 9, 10 W. & M. c. 25. § 30. 12 Ann. c. 9. § 21. 30 G. 2. c. 19. § 1.

Mr. Walker, for the plaintiffs—

1st. point—He admitted the distinction; but argued, that the injury here was consequential only; and therefore case would lie. And we do not bring the action for breaking the soil, but for what was done in consequence of it. We could not bring trespass for breaking the soil: for, that is the lord's.

2d point—This is only a memorandum; not a lease: 'tis, at most, but a licence. And it is not necessary that it should be stamped.

Mr. Clayton, in reply.

1st point—The entering digging and carrying away is an immediate trespass.

2d. This is a lease, though not under hand and seal: a lease may be good, without those circumstances.

LORD MANSFIELD—The whole question will turn upon what the agreement is: that will go both to the species of action, and to the necessity of stamping.

Uterius concilium.

Upon the second argument, Mr. Morton, for the plaintiffs insisted—

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1st. That in fact, *no such possession* is stated to be in the plaintiffs, as can support them in bringing trespass *vi et armis*. For, the soil, was *not in them*, but in the lessor or grantor of Mrs. Moore; and Mrs. Moore's own grant to the plaintiffs is *no lease*, but only a licence to dig for lead-ore: the plaintiffs themselves would have been trespassers, if they had offered to meddle with the soil for any *other purpose* than that of digging for lead-ore. Therefore the plaintiffs could not have maintained an action of trespass *for breaking the soil*; nor for *entering their mine*, when it was not yet a mine at all: neither could they have brought trespass *de bonis asportatis* for taking and carrying away *their lead*. Mrs. Moore could not have distrained it for the rent reserved, if it had been left upon the place: neither could it have been taken in execution as goods and chattels of these persons who had this licence to search for it, in case there had been an execution against them. If an action of trespass would lie for the plaintiffs, in the present case, the defendants would be *liable to two actions* of trespass, for *one* single trespass only: for, Mrs. Moore might certainly bring trespass against them, as owner of the soil; or, if not Mrs. Moore, the person who is by law owner of the soil.

However, it has never been determined, "That case will *never lie*, where trespass will lie." The former species of action is not excluded from *every* instance in which trespass *vi et armis* may be brought: on the contrary, the plaintiff may in many cases bring *either* one or the other at his election.

In *Style 99. Roll* held, that for rescuing a prisoner out of the plaintiff's custody, he may have an action upon the case, or trespass *vi et armis*, at his election.

In 1 *Ld. Raym.* 187. *Shapcott v. Mugford*, against a parson for not taking away his tithes—The court said, that "Though it should be admitted that the plaintiff *might have had trespass* yet that was no argument; because, in many cases, the law allows a double remedy." The case of *Thorn-ton and Austen* was there cited and approved; and that of *Stodden v. Harvey*, in 2 *Cro.* 204. was likewise cited and considered; and yet they held as above.

He likewise cited the cases of *Pitts v. Gaince* and *Foresight*, in 1 *Sall.* 10. and *Reynolds v. Clarke*, in 2 *Ld. Raym.* 1399.

And concluded this point with comparing the property of the present plaintiffs to those uncertain properties which a
man

man may have in the *prima tonsura* of grafts, or in an inheritance depending upon the *future casting* of a lot; and other cases where trespass cannot be brought till the thing is severed.

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2d. As to the STAMP—He denied this writing to be such a sort of instrument as requires a stamp. 'Tis not a lease, nor an indenture, nor a deed-poll: it is only a MEMORANDUM, an agreement executory, about a mere contingent interest depending on the will of the plaintiffs and their election whether they would or would not dig for this lead-ore.

Mr. Wedderburne, *contra*, for the defendants.

First point—1st. The plaintiffs certainly claim under a LEASE from Mrs. Moore, of these mines. She was actual lessee of them, from the crown: and the plaintiffs are her lessees of them. There is no technical form of words necessary to constitute a lease. However, here are the technical terms "*let or set*" actually used; and no essential form of a lease is wanting: an *ejectment* would have lain upon it. This is nothing like a contract with adventurers: for here was a mine existing, and the rent made payable immediately. A mine is demisable, distinct from any right to the land. This must be more than a licence. A licence is personal; This interest is transmissible. Here is a rent reserved: and the lessees are bound to continue working the mine, if once they begin at all to do so.

2dly. The plaintiffs were in POSSESSION. It is expressly stated "That they have worked for and got lead-ore there."

3dly. The injury here complained of, is IMMEDIATE, and not consequential. The act of the defendants which immediately affects the plaintiffs is "*Digging for the lead-ore within their limits and thereout raising it.*" The loss the plaintiffs have sustained, is the value of the lead: and there is no other consequence whatsoever. *Trespass* certainly lies for this lead, after the plaintiffs had reduced it to possession: and so it is in cases of *prima tonsura*, and *herbage*. 'Tis true that both actions may lie, where there is both an immediate and also a consequential injury done: which was the nature of the cases cited by Mr. Morton; and therefore the plaintiffs therein, being intitled to both actions, must have their election to proceed in either. The case of *Thornton v. Austen*, cited in 1 *Ld. Raym.* 188. is exactly similar to the present: and that of *Hills and Clerk*, there also cited, was the same point, and determined upon the same reason. And there is a reason for preserving a proper distinction of actions. The statutes

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concerning *costs* are, of themselves, sufficient to render this necessary: and the *judgments* are also different; for in the one, there is a fine to the king; in the other, none. *This* ought to be *trespass*, and not *case*; because the injury is *determined* by the act itself: and therefore it is not like *cases* of commoners, or *estovers*, and profits a *prendre*. And as to the defendants being liable to *two* actions for the *same* *trespass*, if an action of *trespass vi et armis* would lie;—they will in *either* case be liable to *two* actions: and it is indifferent to them, *who* are the *plaintiffs* in the two actions.

4thly. The distinction is settled, “That if the *p'aintiffs* “might and ought to have brought *trespass*, *case* will *not* lie.”

Second point—This is a *LEASE*, as is before shewn; and therefore ought to be *stampt*. He cited two cases at *nisi prius*; viz. *Hall v. Down*, at *Easter* or after *Hilary* sittings 1735, before *Ld. Hardwicke*; and *S. P. Tr.* 12 G. 1. before *Ld. Raymond*, *Moor v. Evelyn*, *Tr.* 12 G. 1. *B. R.*

THE COURT having observed, that though *Mr. Wedderburne* had called this instrument a *LEASE*, and *Mr. Morton* had called it only a *MEMORANDUM* or *agreement executory*, yet it seemed rather to be an *ASSIGNMENT* of *Mrs. Moore's* whole interest, for and during her *whole* time; and that if it be a lease, yet it is for the *whole of her term*: and that the question would therefore be, “Whether it is not necessary that “such an *assignment* should be *stampt*,” and “Whether “such an *assignment* must not be *by deed*”; especially, where it is an assignment of an interest under a lease from the crown, which is upon record—

Mr. Morton, in reply, took notice that *Mrs. Moore* might have (for aught that appears to the contrary,) *other* interests in the soil, under her lease from the crown, besides this right of digging for lead-ore: she might have had such an interest in this right “to dig for lead-ore,” as would pass without a deed, and though the original grant from the crown must be under the great seal, yet an *uncertain* interest arising under it may be conveyed and assigned by note or writing under the party's hand: 29 Car. 2. c. 3. § 3.

The plaintiffs here had no such *possession* as that an *ejectment* would lie upon it: they had no more than an *interest* which they had liberty to pursue or to desert, at their election.

The injury done to them is the finding and taking away the lead-ore: the digging does not affect them, as they were not owners of the soil. Therefore it is a *consequential* injury.

Lord

LORD MANSFIELD observed a circumstance that had not been mentioned by the counsel on either side; viz. that Mrs. Moore appears to be ** herself* a partner for $\frac{1}{2}$ of the lead: and she can neither let nor assign to *herself*. So that the legal estate continues in her; and they come in as equitable partners.

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* V. ante 1558.

Mr. Justice WILMOT—She lets to seven persons and *herself*.

THE COURT having taken time to consider this case—

LORD MANSFIELD now delivered their resolution, in favour of the defendants.

First,—As to the nature of the action.—It appears that the plaintiffs were in possession of the mine: for, they had actually wrought it; and were not to cease working it, unless hindered by some unavoidable accident; and Mrs. Moore's agents were to have leave to inspect their workings. It is clear, therefore, that they were in possession of it. And the injury done is a trespass. Therefore the proper action is an action of TRESPASS. Whoever is in possession, may maintain an action of trespass, against a wrong-doer to his possession.

If there be a doubt about the extent of his possession, or what part he is in possession of, a writing relating thereto may be given in evidence, in maintenance of his action of trespass for a wrong done to that part which he is in possession of. The title may be material to be given in evidence, in order to maintain his possession as to that part, and to ascertain the extent of it. Therefore this ** writing* (whatever it be called) might be proper to be given in evidence, in order to support the action. But it is no LEASE; because nothing is reserved to Mrs. Moore. It is not an assignment; because it is not by deed: an assignment must be by deed. It rather seems that the legal property continued in Mrs. Moore. So that it seems to be either an agreement for an assignment; or else a declaration of trust; an equitable interest, leaving the legal property in Mrs. Moore. In a court of equity, the plaintiffs would be considered as being in possession from the time of the agreement: and here it is stated, in effect, "That they were in possession." This shews that the action ought to have been an action of TRESPASS. And in an action of trespass, this writing might have been given in evidence: though, if it had been a lease, it could not have been given in evidence without being stamped.

* V. post. Beck, ex dimiss. Fry v. Phillips, 7th Feb. 1772. B. R.

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HARKEN et al.

vs.
BRANCK
et al.

We are all clear, that the action *ought* to have been
TRESPASS.

Let the POSTEA therefore be delivered to the
defendants: and let them be at liberty to
sign a nonsuit.

Mylock *versus* Saladine.

(1 Black. Rep.
480. S. C.)

Venue changed
through apprehension of a
partial trial.

* Mr. J. Deni-
son was absent;
and had been so,
during this
whole term.

ON shewing cause why the *venue* should not be changed
from the city of *Chester* to the *county* at large,—

Lord MANSFIELD, * Mr. Justice WILMOT, and Mr.
Justice YATES were all opinion, that in *transitory* actions,
the court ought to change the *venue*, when it appears upon
circumstances laid before them, that there is a probable
ground to apprehend, a fair impartial or at least a *satisfactory*
trial can not be had.

Accordingly, in this case, there having been a trial in the
city; and a new trial ordered because the verdict was against
the weight of the evidence, and the damages excessive (if it
had been warranted by the evidence;) and there being a
strong proof given by affidavits, of a general *prejudice* in the
city; they made the

RULE ABSOLUTE.

Rex *versus* Philipps, Lucas, and Gibson.

MR. Attorney-General having yesterday moved the court
for leave (in the ordinary form of these motions) to
exhibit an *information* against several persons for a most gross
misdemeanor in attempting to influence the jury returned to
try Mr. *Wilkes's* cause, by sending them several pamphlets
and inflammatory papers; and actually preventing Mr. *Wood*
of *Littleton* and Mr. *Clitherow* of *Brentford*, two of those
special jurors who had been before summoned, from appear-
ing, by sending an express to them in the middle of the night
preceding the day of the trial, with a fictitious letter (signed
“summoning bailiff,”) acquainting them “That the trial
“was put off,” (when in truth it was not put off, but did
then come on—)

Lord

Lord MANSFIELD declared, that the Court would never grant an information upon the application of the Attorney General, in cases prosecuted by the crown; because the Attorney General has a right, himself, *ex officio*, to exhibit one: and he may, if he thinks proper, summon the parties, to shew cause "Why it should not be exhibited," before he signs it. This is *not* a case within the act, of 45 *W. & M. c. 18.* "To prevent malicious informations in the court of king's bench." And therefore his lordship told Mr. Attorney General, "That he must use his own discretion."

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REX v.
PHILIPPS and
Others.

* V. post. pa.
2089.
Rex v. Phillips,
30th May 1767,
accord.

Whereupon Mr. Attorney changed his motion, and prayed 2^d rule to shew cause why an attachment should not issue against Lucas and Gibson (who were two of Mr. Philipps's clerks or agents,) upon the affidavits, which charged them with being concerned in this male-conduct: which rule he obtained.

Against this rule for an attachment, they now shewed cause. The facts were certain: "Whether the persons complained of were concerned in them," was the only doubt. And by their affidavits, they exculpated themselves, to the satisfaction of the court: who therefore

DISCHARGED THE RULE.

The End of Trinity Term 1764. 4 G. 3.

Michaelmas

Michaelmas Term

5 Geo. 3. B. R. 1764.

Trinder *versus* Watson and Another.

Wednesday,
7th Nov. 1764.

Vide ante,
1545. Biddle-
son v. Whytel.

Whether special
bail requisite,
upon error re-
turnable in par-
liament, upon
judgment in
B. R. in debt
upon recogni-
zance in error.

THIS was a writ of error returnable in *parliament*, brought upon a judgment in this court in an action in debt upon a *recognizance in error*. And the plaintiff in error in parliament *not* having entered into a recognizance pursuant to 3 *J. 1. c. 8.* the defendant in the said writ of error moved for and obtained a rule for the said plaintiff in error to shew cause why the defendant in error should not be at liberty to *sue out execution*, for want of such recognizance.

Mr. *Wallace* shewed cause, for the plaintiff in error; and insisted, that 3 *J. 1. c. 8.* does not require bail on bringing such a writ of error as this is. For, it only requires bail upon writs of error for reversing judgments in any action or bill of debt upon any *single bond* for debt, or upon any *obligation* with condition for the *payment of money only*, or upon any action or bill of debt for *rent*, or upon any *contract*; whereas *this writ* is for reversing a judgment in an action of debt upon a *recognizance*; which judgment is of a *superior* nature to any of the judgments specified in the statute. And it is an established rule, "That when a statute begins with specifying *inferior* means, instances, or persons; no means, instances, or persons of *superior* nature or kind, shall be included." 2 *Rep.* 46. b. Archbishop of *Canterbury's* case. Consequently, a writ of error to reverse a judgment in an action of debt upon a *recognizance* is *not within* this statute. This rule was applied to cases arising on this very statute; in *Taylor v. Baker*, 3 *Keble* 802. and in *Biddleston v. Whytel*, last term.* In *Trin.* 18, 19 G. 2. C. B. *Barnes's* notes, vol. 2. p. 161. "After an award of execution, against bail on a recognizance in error, a writ of error was brought by the bail, as to such award of execution. The plaintiff moved for leave to

"take

*V. ante, 1545.

"take out execution, for want of bail on the writ of error brought by the bail; and obtained a rule to shew cause: which rule was discharged; no bail, in this case, being required." So, in the present case, the action being brought upon a recognizance in error, as that was; and this being a like rule with that; it ought to be discharged, as that was.

Sir Fletcher Norton, (Attorney General) *contra*, for the defendants in error, argued, that this recognizance in error, upon which the present action was brought, was an obligation with condition for the payment of money only; and therefore, by the express words of this statute, "No execution shall be stayed or delayed upon any writ of error, sued for reversing the judgment therein, without putting in bail." The statute does not confine it to bonds; but speaks of "Obligations with condition for the payment of money only." And this is an obligation so conditioned: it is conditioned, "To prosecute with effect, and to pay the debt damages and costs upon the former judgment, together with costs and damages for the delay of execution." It is indeed conditioned to be defeated, in case the writ of error had been prosecuted with effect. But this writ of error has not been prosecuted with effect: it has been NONPROSSED for want of prosecution. And the recognizance thereby became an obligation conditioned for payment of money only. It was eventually so, from the first: and at the time when the action was brought, it was actually become so. It is true, that it was not an obligation "To pay money, in all events." But in the event that has happened, only money is to be paid; there is no alternative, "To surrender the principal." It is like the cases of writs of error brought upon judgments in actions on bottom-rebonds. On these bonds, the money is not absolutely payable in all events; but if the ship comes safe home, it thereby becomes an obligation for payment of money only; and then the court will require bail on bringing a writ of error. *Pitt v. Coney*, 1 Sir J. S. 476. M. 8 G. 1. B. R. "Per Curiam—" The contingency having happened, this is now in every respect, a bond for the payment of money only; and therefore there must be bail." As to the case of *Bidlefon v. Whytel*, it went off, he said, upon another foot. [See it, ante 1545.] And as to the case in *Barnes* 161, he said, it could not have been determined upon the reason there given; viz. "That no bail was in that case required."

Lord MANSFIELD said, he should have thought, "That these cases ought to be liberally construed," as they arise upon remedial laws. But in that case of *Bidlefon v. Whytel*, it

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1764.

TRINDELL V.
WATSON and
Another.

it appeared "That the determinations had been otherwise," and we must not depart from settled determinations. In that case the weight of authorities prevailed.

Mr. Justice WILMOT expressed himself to the like effect.

THE COURT ordered it to stand over, to inquire into the practice. And on the last day of the term, Mr. Attorney General moved to enlarge the rule: but the rule made upon that motion was never drawn up; nor does any thing further appear to have been done in consequence of it. So that the defendant in error probably gave up his motion, "To be" "at liberty to sue out execution."

(1 Black. Rep.
517. S. C.)

Tuesday, 13
Nov. 1764.

Bond for cohabitation with a woman seduced by obligor, and for maintenance after his death, void in law.

Walker versus Perkins, Administrator.

SARAH WALKER brought an action upon a bond. Upon oyer being prayed, it appeared to be a bond from *William Perkins* the intestate, to the plaintiff, in a penalty. It recites, that whereas the above bound *William Perkins* (the intestate) and *Sarah Walker* had agreed to live together, therefore he had agreed to find her meat, drink, washing and lodging &c; and to leave her an annuity of 60 l. a year, if he quitted her, or she outlived him; and if they had any child, he was to take care of and provide for it. But if she should leave him, or go to another man, then he should not be obliged to provide for her any longer, or to leave her any annuity.

The defendant pleaded, that this was an agreement between the plaintiff and his intestate, "To live together in a state of fornication;" and that such a bond made in pursuance and support of an agreement "To live together in fornication," is void in law.

In reply to this plea, the plaintiff alledged, that she was a virgin, and was seduced by the intestate; and in consideration thereof, this bond was given to her by the intestate: and that it was *premium pudicitia*.

To this replication the defendant demurred.

Mr. *Blackstone*, for the plaintiff, observed, that the condition consists of two parts; one, "To live together in a state of debauchery;" the other, "To leave her an annuity:" the former part whereof, is void; the latter good. The suit may

may therefore well be upon the *virtuous* part, the paying her the annuity. For, it is agreed, in the case of *Chefman et ux v. Nainby*, 13 G. 1. B. R. 2 Lord Raymond 1459, and 2 Sir J. S. 744. that the position laid down in *Hobart* 14. (in the case of *Norton v. Simmes*) "That the common law, "having made that void that is against law, lets the rest "stand"; and that where a bond is conditioned to do some things agreeable to common law, and others disagreeable to it; the breach may be assigned upon *that part* which is good.

And here *premium pudicitie* is a sufficient consideration.

Lord MANSFIELD.—It is the price of prostitution, *premium prostitutionis*: for if she becomes *virtuous*, she is to lose the annuity. It appears clearly, upon the condition, that the bond is *illegal* and *void*.

JUDGMENT for the DEFENDANT.

Rex versus Baptist Rebord.

ACTION on 26 G. 2. c. 21. § 3. for a forfeiture of 200*l.* for having unsealed wrought silks found in his custody.

Upon shewing cause why the defendant should not be discharged on *common* bail. Mr. Wallace for the plaintiff, said, it had been objected "That this was a popular action."

But he answered, that the 8th section of this act of 26 G. 2. c. 21. (on which this action was brought) expressly authorizes to hold to *special* bail: it gives a *capias* in the first process, specifying the sum of the penalty sued for, and directs "That the defendant shall be obliged to give sufficient "bail &c."

Mr. Stowe for the defendant, objected, that though the act gives a *capias* &c, yet it is not positively sworn in the plaintiff's affidavit "That the defendant has committed the offence:" it is only, "That he has cause of action against him for 200*l.* forfeited by him for so much unsealed silk " &c, found in his custody." This is making the plaintiff a judge of the offence. It ought to be positive, "That the "defendant had committed the offence described in the act of "parliament."

Cur'. It is positive enough: he swears "That he had "cause of action against him for 200*l.* forfeited by him &c."

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WALKER v. PARKING

Thursday, 15th Nov. 1764

Special bail shall be given to pay the forfeiture, or yield the body for defendant having unsealed wrought silks in his custody.

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REX V.
RECORD.

The act does not require an affidavit all.

RULE DISCHARGED.

Evans, ex dismiss' Brooke Bart. *versus* Astley,
Esq; et al.

(1 Black. Rep.
499. 521. S. C.)

Friday 26 Nov.
1764.

Devise to the
three sons of A.
in tail male,
successively; re-
mainder to all
and every the
after-born sons
of A. without
naming any
estate; remain-
der, for want of
such issue, to B.
in tail male;
the after-born
sons of A. take
an estate in tail
male.

THIS was a special verdict in ejectment, of lands in se-
veral parishes in the county of *Chester*, found at the
summer-assizes for that county in 1762.

It stated, that Sir *Samuel Daniel* was, on the 19th of *Fe-*
bruary 1762, seised of the premises in question; and being
so seised, he, on that day, made his will, duly attested, and
written with his own hand: in which will are contained the
following clauses and provisos, *viz.*—" And whereas I am
at this time seised of a fee-simple estate in the county pa-
latine of *Chester*, in the several manors and townships of
Over-Tabley &c, &c. Now, for preventing and quieting
all disputes and controversies touching and concerning who
shall hold and enjoy my said estate if I die without issue male
or female, I do, by this my last will and testament in
writing, under my own hand and seal and published by me
in the presence of the witnesses whoses names are here-
written, give grant limit devise and appoint all my said
manors lands and tenements with their appurtenances, in
Over-Tabley &c, &c. with their several and respective rights,
members and appurtenances in the said county of *Chester*,
and all other manors &c &c, and hereditaments whatso-
ever, of what kind or nature soever, wherein I have any
manner of estate, situate lying and being in the county
palatine of *Chester*, unto *Samuel Duckenfield* my godson and
son of *Charles Duckenfield* of *Mobberley* in the county of
Chester esq; during his natural life, and the heirs male of
his body lawfully to be begotten; and for want of such
issue, to *Charles Duckenfield*, another of the sons of the
said *Charles Duckenfield* esq; during his natural life, and to
the heirs male of his body lawfully to be begotten; and
for want of such issue, to *John Duckenfield*, another of
the sons of the said *Charles Duckenfield* esq; during his
natural life, and to the heirs male of his body, lawfully to
be begotten; and for want of such issue, then to every
son and sons of the said *Charles Duckenfield*, esq; which
shall be begotten on the body of *Sarah* his now wife:
and for want of such issue, then to *William Hulston* of the
city

" city of *Chester* during his natural life, and the heirs male
 " of his body lawfully to be begotten; and for want of
 " such issue, then to *Samuel Goldston*, of *East Ham* in the
 " county of *Essex*, my godson, for and during his natural
 " life, and the heirs male of his body lawfully to be begotten;
 " and for want of such issue, then to *James Goldston*, bro-
 " ther of the said *Samuel Goldston*, during his natural life,
 " and the heirs male of his body lawfully to be begotten;
 " and for want of such issue, to the right heirs of the said
 " *Sir Samuel Daniel*, for ever."

1764.

EVANGEL
dimiss.BROOKE v.
ASTLEY et al.

" Provided always nevertheless, and my express will and
 " mind is, and I do hereby declare, that the estate hereby
 " granted, devised and limited, of the premises, to the said
 " *Samuel Duckenfield* and others as aforesaid, shall be upon
 " this express condition, that if the uses and estates so granted
 " devised and limited to him or them and their descendants
 " shall come to him or them and be in possession, that then and
 " thereupon he and they and their descendants, to whom the
 " premises shall come and be in possession, shall procure an
 " act of parliament to be past in the first or second sessions
 " of parliament, by virtue whereof he and they shall take
 " and use my sur-name, and bear in chief the arms of the
 " *Daniels* of *Over-Tabley* in *Cheshire*, where my family
 " hath been very ancient: or, otherwise, the uses and
 " estates so granted devised and limited to them who shall
 " refuse or neglect to take and use my name and arms in
 " chief as aforesaid, to determine."

" I give all my books (except what given to my wife,)
 " both at *Tabley* and *Hollis-Street*, in the county of *Middle-*
 " *sex* and parish of *St. Mary le Bon*, and all my family-pic-
 " tures, and all other pictures (except what is given to my
 " wife) at *Tabley* and *Boxton*, and all statues clocks and
 " bells, brewing-tubs and brewing-vessels, and all vessels be-
 " longing to the cellar at *Tabley*, and all goods at *Tabley*,
 " after my wife's decease, and all the interest title and re-
 " mainder of years which shall be unexpired at my death,
 " which I have in the lease from the dean and chapter of
 " *Christ-Church* in *Oxford*, of the tithes of *Over-Tabley* and
 " the moiety of the tythes of the parish of *Rotherstone*
 " (being small tythes) in the county of *Chester*, unto *Samuel*
 " *Duckenfield* aforesaid; and if he happen to die, then to
 " the next in remainder, or any other that by this my
 " will shall enjoy the estate hereby granted and devised:
 " and my desire is, that my executors shall renew the said
 " lease at every seven years end; that it may be kept in
 " the possession of the family at *Over-Tabley*."

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EVANS ex
dimiss.
BROOKE v.
ASTLEY et al.

" Item, I give and bequeath my silver punch-bowl, and
" silver ladle, and marrow-scoop, and the two large silver
" decanters which were made of the silver of my two trum-
" pets which I had when major of the horse in Ireland in
" 1690 and 1691, to the said *Samuel Duckenfield*; or, if
" he happens to die, to the next in remainder, or to any
" other that by this my will shall enjoy the estate hereby
" granted; and desire my executor to keep them for the fa-
" mily, as abovesaid."

N. B. There was a power, given to make leases; and also
a power, to make *jointures* to the amount of 200*l.* per
annum.

Samuel, John, and Charles Duckenfield, the three sons of
Charles Duckenfield of *Mobberley*, all died without issue.

But *Charles Duckenfield* of *Mobberley* had a fourth son,
named *WILLIAM*, born *after* the date of the will; who
became seised, and took the name and arms of *Daniel*,
according to the directions of the will; and *suffered a recovery*,
and then made his will; (under which will, the *defendants*
claim.)

William Hulton, and *Samuel* and *James Goldston*, (the
other remainder-men,) died without issue male.

The lessor of the plaintiff claims as one of the right heirs
of the testator *Sir Samuel Daniel*; viz. one moiety of the
estate under a co-heiress; all the prior remainder-men being
dead without issue.

The question was "WHAT estate *Sir William Duckenfield*
" *Daniel* (the fourth son of *Charles Duckenfield* of *Mobber-*
" *ley*, esq;) took, under this will of *Sir William Daniel*."

This case was argued on *Tuesday* the 3d. and *Friday* the
6th. of *July* last, by *Mr. Blackstone*, on behalf of the
lessor of the plaintiff; and *Mr. Eliab Harvey*, on behalf
of the defendants.

Mr. Blackstone contended, that he took an estate for LIFE
only.

He begun with laying down some *general* rules and prin-
ciples concerning devises of land. They must be expounded
agreeably to the *intention* of the testator, if such intention
be not repugnant to the rules of law: and the intention
of the testator must be collected from the *whole will taken*
together.

together. An *estate-tail* shall not be raised by implication, unless it be a *necessary* one: a conjectural or merely probable implication is not sufficient ground for disinhering an heir at law. If the testator's intention is *dubious*, the construction shall be in favor of the *heir at law*.

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Upon this whole will taken together, there is no ground to suppose that the testator Sir *William Daniel* meant to give this devisee any thing beyond an estate for life. The restrictive circumstances attending his particular devises, and his care to preserve the estate in his name and family and in a precise prescribed condition, indicate quite the contrary to such a supposition.

It is not sufficient, to say, that "Because the testator has given an estate tail to *Samuel, Charles, and John*, he must have intended the *like* for every other son of their father to be begotten on the body of his then wife *Sarah*." For, there is no appearance of any such intention. On the contrary, it would be more agreeable to his apparent intention, if *those* three should be construed only estates for life, to render *those* devises conformable to this. He cited *Co. Lit.* 42. *Skinner* 385, 562. *Beveston v. Hussy*. *Skinner* 339. *Middleton v. Swain*, and *Showers's P. C.* 207. *Swaine v. Fawcener et al.* S. C.

Nor will the subsequent words—"And for want of such issue, then to *William Hulton*," suffice to create an estate tail, where there was no estate before. *Vaughan* 259. *Gardner v. Sheldon*. 2 *Vernon* 546. *Cook v. Cook*. *Forrester* 18. *Lord Glenorchy v. Bosville*.

Mr. *Harvey*, on behalf of the defendants, (who were the devisees of Sir *William Duckenfield Daniel*), contended that the said Sir *William Duckenfield Daniel* who was the 4th son of *Charles Duckenfield esq*; and born after the making of Sir *William Daniel's* will, must, upon the tenor of the said will, taken all together, and by the manifest intention of Sir *William Daniel* the testator, have taken an *estate tail* under it.

He said, it was plain that an estate tail was the *least* estate that the testator intended for him: and this he had barred by the recovery. But if he took a *fee*, then the remainder "To the testator's own right heirs" (under which remainder the lessor of the plaintiff claims) never took place.

He agreed to the 3 principles laid down by Mr. *Blackstone*; namely, "That devises are to be expounded, if possible, according to the intention of the testator; that the construction

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* V. ante vol.
1. p. 38. (The
certificate is at
p. 50.)

" must be collected from the *whole* will taken together,"
and " That the implication by which an estate tail is to be
" raised, must be *necessary*, and not merely conjectural or
" imaginary."

He said, the *true* rule of *implications*, was that which was
laid down in the certificate of this court in the case of *Robin-*
son v. Robinson,* and affirmed by the judges in the house of
lords, on 14th of *February* 1758, viz. when such implication
is *necessary* " to EFFECTUATE the manifest general intent of the
" testator."

This gentleman intended to have his estate kept entire; and
his name and arms preserved. He adopts the line of his
eldest sister, who had 3 sons, with a probability of more.
He insists rigidly upon their taking his name and arms; and
gives heir-looms, books, pictures and furniture: and he
meant to give his 3 nephews then in being (*Samuel, John, and*
Charles,) no more than *life-estates*, with contingent remain-
ders to their male issue; though by *legal* construction of his
words, they took estates-tail. But it is very certain, that he
did not intend that any remainder-man should succeed to
his estate, *whilst* any male issue of *any* son of his sister *Duck-*
enfield should remain in being. The estate therefore of this
after-born nephew *ought to be* ENLARGED by implication; be-
cause such implication is absolutely necessary, to *effectuate* the
manifest general intention of the testator.

The court will therefore make a *construction accordingly*,
and will *supply* the proper words.

And as the proviso directs " That *Samuel Duckenfield* and
" the other devisees, *and their* DESCENDANTS, shall, upon
" their coming into possession, procure an act of parliament
" to take his name and arms;" and as it is clear, that he
meant that these *descendants* should take his *estate*, as well as
his name and arms; the court needs only to *supply* the word
" DESCENDANTS," in this devise to the after-born son and
sons; (which is indeed *necessarily implied*;) and then, (let
the words " and for want of *such issue*" be applied either
to *Charles Duckenfield* esq; or to his every after-born son and
sons,) it must be construed an estate tail: for those words
would be sufficient to create an estate tail in a *will*; and are
rather stronger than the word " seed" or " children."

If the words " and for want of *such issue*," can be referred
to the want of issue of the after-born son *himself* there can
then be no doubt but such after-born son took an estate-tail:
for,

for, a devise "To a man, and for want of heirs of his body remainder over;" or, "If he die without issue;" or, "For want of issue"; will create an estate tail, although there be no direct limitation of the estate. And the word "*such*" may refer to the issue of the after-born son or sons; and mean *such sort* of issue as that in default of which, from Samuel, Charles, and John, the testator had limited the estate to every after-born son and sons; that is, *heirs male of the body*.

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He intended an estate for life only, to his three nephews that were in being: but he intended a different estate, some estate of *inheritance*, to his after-born nephews.

He could neither intend, nor would the law permit, that the after-born sons should take *successive* estates for life: that would be contrary to the resolution of the case of *Humberston and Humberston*, 1 *Williams* 332. where the lord chancellor declared an attempt "To make a perpetuity for successive lives," to be *vain*.

He could not intend that the 2d. and 3d. after-born sons should take in preference to the *issue male of the first* after-born son; and that they and they only should lose the benefit of his devise; and even that they should be excluded in favour of *strangers*, as the other remainder-men were. And it is merely *accidental*, that the present claim is set up by a *right heir* of the testator: for *Hulston* and the two *Goldstons* would have had the same claim, prior to him, if they had happened to live.

If it be asked "Whether the after-born sons of *Charles Duckenfield* esq; should have taken *jointly*, or in *succession*, in case there had been more than one;" the answer is— "In *succession*": for they were *not in being*. If they had been in being, then indeed they would have taken jointly. This is the distinction laid down in *Cook v. Cook*, 2 *Vern.* 545. And this was the *manifest intention* of the testator. And to aid and effectuate his intention, the court will supply the deficiency of expression, by adding the word "Descendants" or "Heirs of the body" of such after-born son; or by applying the words "And for want of *such* issue," to the want of issue of *such son*. And this would not be going so far as the like point was carried in the case of *Robinson v. Robinson* before-mentioned*. There *Lancelot Hicks* was construed to v. ante. take an estate in tail male, he and the heirs of his body taking the name of *Robinson*; notwithstanding the *express* estate devised to the said *Lancelot Hicks* "For his life AND NO LONGER." Vol. 1. p. 38. to 53.

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* The word
"the" was
omitted.

The case of *Lomax v. Holmeden*, in chancery, was very near the present : and would have been almost in point, if it had received a more solemn determination. It came on by petition before Lord *Hardwicke*, in *Trin.* 23 G. 2. 1749. *Joshua Lomax* the petitioner's grandfather, by his will dated 9th. December 1720, devised lands in trust &c : (See 3 *Peere Williams* 176.) then to the use of the petitioner's father *Caleb Lomax* (his son) for life ; then to the use of the trustee and his heirs during *Caleb's* life, to preserve contingent remainders ; then to the use of the first son of *Caleb's* body and the heirs of the body of such first son ; and for want of such issue, to * second, third, fourth and fifth sons of *Caleb*, successively, and in remainder one after another ; (without specifying WHAT ESTATE he gave them ; the words of inheritance being by mistake omitted, as they are in the present case ;) and for want of such issue, to the use of his four daughters and their heirs. *Caleb's* eldest son (named also *Caleb*) died without issue, very young. After which, the petitioner was born. Two questions were made : 1st. Whether the petitioner could take as first son of his father *Caleb* ; 2dly. If he could not, then whether he might not, however, take an estate tail by applying the words "such issue" to the issue of his body. It was determined upon the first point, But upon the 2d. question, Lord *Hardwicke* said, he inclined to think that the petitioner might take an estate tail ; from the latitude that must be taken in supplying the omission of the word "the" and in construing the words "successively" and "and for want of such issue" ; all which must be supplied by some construction or other : however, as he was clear upon the 1st point, he avoided giving any direct opinion upon the second. And it appears by a report of a former branch of the same case in *Hilary* term 1732, (3 *Peere Williams* 179) that Sir *Joseph Jekyll*, then master of the rolls, held "That the now petitioner (and then plaintiff) was intitled to take an estate tail."

Upon the whole, this after-born son took at least an estate tail : and it may be doubted whether he did even take a fee. For the testator devises "All his manors lands and tenements wherein he had any manner of estate :" which seems to import that he gives to the respective devisees all the ESTATE that he himself had in them ; which was, and which he takes notice to be, "A FEE-SIMPLE estate."

Mr. *Blackstone*, in reply—Certainly, not a fee-simple : for, the testator intended a less estate than that, to his three eldest nephews,

The

The words "*Wherein I have any manner of estate*" only mean to ascertain the locality of the lands devised and render the description of them the more clear. His *manifest intention* is contrary to *this* construction.

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dmiss.

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Nor can it be an estate *tail*: because both the words and the intention agree that it is only an estate for *life*. And he intended *no more* to his 3 nephews *Samuel, Charles, and John*; though, in point of *law*, their's will be construed into estates *ail*.

^t Mr. *Harvey* supposes the condition "To take and use the testator's name and arms," to extend to the descendants of all the sons of *Charles Duckenfield* esq: whereas the testator expressly confines it to *such* of them as shall come into possession; "Their descendants, to WHOM the premises shall come and be in possession." Their descendants are not required to take the name and arms, *unless* the estate comes to them. Therefore no argument can be drawn from this proviso. And in fact, the defendant's testator, Sir *William Duckenfield*, never did take the name and arms of *Daniel* for himself and his descendants; but only for *himself*, for *life*. The bill was objected to, upon that account: and the act of parliament was at last settled to extend only to *himself* for *life*.

The words "And for want of *such* issue" can not refer to issue *not named* in the will; neither is there any colour for expounding them of *such sort* of issue as *that* in default of which, from *Samuel, Charles, and John*, the estate was limited over to their after-born brothers: the same words must be construed in the *same manner*, in both places. This is *now* the case of an heir at law; and therefore is intitled to favour, upon *that* account.

In the case of *Loman v. Holmeden*, there were 2 questions before Lord *Hardwicke*; one of which resembled the present case: but *that* point was not in question before Sir *Joseph Jekyll*. (See 3 *Peere Williams* 179.) And Lord *Hardwicke* determined the case upon the first point, which had nothing similar to the present: whereas a determination upon the point similar to the present would have been a plain and easy method of getting rid of the whole difficulty of the case, if Lord *Hardwicke* had holden the second son of *Caleb Loman* to have taken an estate-tail under his grandfather's will.

The case of *Humberston v. Humberston* does not affect our case: for Sir *William Duckenfield Daniel* was born *before* the devise now in question took place.

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Mr *Harvey* has given no answer at all to the two cases cited from *Skinner*; viz. *Middleton v. Sain*, p. 339. and *Beviston v. Hufsey*, p. 563. "That a devise, without the limitation of any estate, carries BUT an estate for LIFE."

Uterius concilium.

This case was again argued now, by Mr. Serjeant *Hewitt* for the plaintiff; and Sir *Fletcher Norton* (attorney general) for the defendants.

For the plaintiff it was observed, that there was no devise at all to *Charles Duckenfield* the father; and those to the three sons are all expressed to be for life: but the unborn sons have no words of inheritance annexed to their estate.

The question therefore is whether the after-born son took an estate for life, or an estate-tail.

He must take according to the intention of the deviser, *Perkins*, § 555, 556. And this intention is to be collected out of the will itself.

In arguing that the testator meant this to be an estate for life only, he cited 1 *Ro. Abr.* 844. letter *M.* pl. 1 *Moore* 52. pl. 153. 3 *Bulstr.* 127. a case put by Mr. Justice *Croke*, of a devise of *Black Acre* to his eldest son and his heirs; and of *White Acre*, to his younger son, omitting the words "And his heirs;" which is very like the present. *Cro. Car.* 368. *Sturt v. Benson.* *Freeman* 85. *Allen v. Spendlove.*

As to the words "And for want of such issue"—"Such" does not mean the issue of the unborn son. 1 *Peere Williams* 54. *Bamfield v. Popham.* The word "Issue" shall not, in the same devise, have a double construction, both of description and limitation. And here is no devise to *Charles Duckenfield* the father: therefore there is nothing to graft the words upon.

The case of *Langley v. Baldwin* (*Pasch.* 1707. *Eq. Abr.* 185.) is not like this; for there, something was given to the father; here, nothing is. So in 1 *Peere Williams* 754. Attorney General against *Sutton and Payman*, something was given to the father, upon which an estate tail could be grafted. So there was in the case of *Robinson v. Robinson.*

The case of *Lomax v. Holmeden*, 3 *Peere Williams* 176. would have been similar to this case, if Lord *Hardwicke* had determined upon it, "What estate the second son should take": but that point was left undetermined.

No necessary implication arises upon the present proviso; because it relates only to those of their descendants to whom the estates should come, and who should be in possession. But an implication to disinherit an heir at law must be a necessary one.

As to taking the *name and arms*—Little regard is to be paid to that circumstance. 2 *Saund.* 384. *Puresfoy v. Rogers*. There is nothing more common than for a man to take a name for *life* only. The meaning was, that the name should go along with the estate. Therefore nothing is to be collected from this circumstance.

LORD MANFIELD—Suppose *Charles Duckensfield* the father had had 7 or 8 sons born after the will was made, but before the death of the testator; and the 3 first to be then all dead.—What estate were the after-born ones to take? as tenants in common; or, in succession; or how?

The serjeant answered—This *uncertainty* makes the devise to the after-born sons *void*. *Non constat* how they would take: therefore the will falls. If they would take at all, they would take *jointly* for their *lives*; as tenants in common, or as joint-tenants.

Sir *Fletcher Norton*, *contra*,—for the defendants, said that these after-born sons would certainly take *something*, by virtue of this devise: and he insisted that they took an estate *tail*, in *succession*. The testator happens only to have omitted to add the words of inheritance after the devise to the unborn sons.

As to the *intention*—The testator requires them and their descendants to take his name by act of parliament, and bear his arms; and every taker has a power to make a settlement*: but he could never mean that many after-born sons, taking jointly or in common, should *each* of them have power to jointure their *several* wives in 200 l. *per annum a-piece*.

* The testator gives a power to make jointures to the amount of 200 l. a year.

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dimitt.

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† V. Equ. Cases

Abr. p. 184. pl.

27. Lucas 181.

Fortescue 133.

† Equ. Cases

Abr. p. 185. pl.

29. erroneously

reported V. ante,

pa. 22. and see

3 Mod. (the

corrected edi-

tion) pa. 258.

|| Equ. Cases

Abr. p. 182.

pl. 23.

* V. ante,

pa. 38 to 53.

The cases on this head are not to be reconciled : † *Backhouse v. Wells* ; † *Langley v. Baldwin* ; || *Loddington v. Kime* ; &c.

There is no doubt but an estate tail may be raised, even contrary to the most express negative words : this was done in the case of * *Robinson v. Robinson* ; where the words " And for default of such issue " were so construed. So here, " For want of such issue " means all their children. The devise is to " Every son and sons of *Charles Duckenfield* the father, by his then wife ; and for want of such issue," then to *William Hulton*, &c.

As to the cases cited from 1 *Ro. Abr.* and *Moore* 52.—The words of the will are there clear, full, and plain ; and were construed according to their natural import : but they do not apply to the present case.

As to 3 *Bulstr.* 127. (the case put by Mr. Justice Croke) the reporter goes on—" But otherwise it shall be, where a man deviseth *Black-Acre* to his eldest son and his heirs for his part or portion, and *White-Acre* to his youngest son for his part (omitting heirs :) yet here he shall have it in the same manner as the other hath *Black-Acre*."

Here, the testator having devised " To every son and sons, and for want of such issue,"—Such issue must be applied to all their descendants : and nothing but taking an estate tail in succession could answer the intention of the testator.

Therefore *William* took an estate tail : and consequently, the recovery suffered by him was good ; and the heir at law is barred.

Mr. Serjeant *Hewitt*, (in reply,) did not insist upon the devise to the after-born sons being void ; but chose to keep to his first point, " That the after-born sons took only for their respective lives."

The word " issue " is in this will used as a word of purchase and description : therefore it shall not be, in the same will, construed as a word of limitation.

Upon Mr. Attorney's construction, the after-born sons would have a different and a *greater* estate than the prior-born, viz. the former tail *general*; the latter, (the prior-born,) only tail *male*: which could never be the *intention* of the testator.

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Therefore the rule of law ought to take place, in favour of the heir at law: and the judgment ought to be for the plaintiff.

Lord MANSFIELD first stated the case very particularly, observing, that the will was written with the testator's own hand; and made in favour of his sister's sons by her husband *Charles Duckenfield*.

The question is, what estate *William* took under this will.

Nothing is so clear, as that the construction must be agreeable to the *intention* of the testator, collected from the will.

Whatever construction would have been put in *William Hulton's* case, if he had been living, must be put *now*: for, subsequent events can not alter the true construction. Therefore all arguments in favour of the heir at law are out of the case; because this must be considered as a question between prior and subsequent remainder-men.

No-body can doubt of the *intention* of the testator. 'Tis too strong, to suppose that he meant *nothing* to the after-born sons.

The words of the will make them indeed *joint-tenants*; but 'tis impossible that *that* could be his *intention*: for, this testator had manifestly a pride in his family. He devises several things specifically, to be "kept for *the family*"; and desires leases to be renewed for the benefit of *the family*. They are to have power to make leases and *jointures*. What? are there to be six or seven jointures, *all at once*?

It must therefore be admitted, that they are to take in *succession*. If so, the *other* circumstances must be taken in, to shew what estate he *meant* to give them. And there can be no doubt, but that he meant them an estate in *tail male*.

Though the will is *written* with the testator's own hand, he probably *copied* it from a draught; and he seems, by mistake,

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dimiss.
Bacon v.
Astley et al.

take, to have omitted some words which were inserted in the original draught.

In the proviso, he recites enough to shew that he meant to give it to the after-born sons in tail male, as he had done to the other sons.

I never had the least doubt but that the testator intended the same estate to these after-born sons, by analogy, as he had given to the prior-born.

Mr. Justice WILMOT also declared, that he had not the least doubt. He conjectured, that the cause of the variation between the devises to the born and unborn sons of Charles Dyckenfield was, that the drawer of the will conceived he could not give to an after-born son for his life, and graft a limitation upon it to another person not in being, for life.

If the testator had intended the latter to be *for life*, he would have said so: but he left it to the general disposition.

But whatever the words are, is it possible to imagine that he intended to disinherit his own nephews, for the sake of strangers; after he had adopted these nephews, as his own sons, for the support of his family? all the provisions tend to prove the contrary, most clearly. He certainly meant them to take *successively*, and not jointly. He could never mean, that they should all live in the family-house *together*, or make several concurrent jointures.

"For want of *such* issue" means "For want of heirs *male* of the body": and this is the true construction."

This case must be considered as if the controversy was between the after-born son, and the *first remainder-man*: so that the plaintiff's being heir at law, and all arguments in his favour on *that* account, are out of the case.

Mr. Justice YATES likewise declared, he had no doubt. He took notice, that this second argument, was allowed on account of the value of the estate in question; not of any doubt that the court entertained about their decision.

It can not be supposed, that the testator meant a *less* benefaction to these unborn nephews, than to the three devisees, his nephews

nephews who were in being. The clauses and circumstances prove his intention to be equal and the same to all.

Per Cur. most clearly and unanimously,

JUDGMENT for the DEFENDANT.

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ex dismiss.
BROOKS v.
ASTLEY & al.

Silk versus Rennett, Un. &c.

Saturday, 17
Nov. 1764.

SIR Fletcher Norton, Attorney General, moved for an attachment against the commissioners of the court of conscience in London, for proceeding in this cause, and issuing an execution against Rennett notwithstanding his having served them with a writ of privilege.

Attorney at law
has no privilege
against the court
of conscience in
London.

The question was, whether the court of conscience in London, (the old city court, not under the new acts) can proceed in a complaint brought before them against an attorney, who has served them with a writ of privilege.

THE COURT refused the motion. For, this court of conscience has a mixed jurisdiction, as well equitable as legal: they proceed *secundum equum et bonum*; (which the recorder attested.) And (as Lord Mansfield observed) the very principle upon which these courts of conscience are founded, is, "That it is not worth while for the plaintiff to be at the expence of bringing his action in a superior court for such a trifling sum."

Therefore THE COURT held, that the writ of privilege did not lie: and consequently, the commissioners had a power to proceed upon the complaint brought before them, notwithstanding their being served with one.

LORD MANSFIELD observed also, that in the present case, there was the less reason to make a precedent of this kind; as it appears upon Rennett the attorney's own affidavit, "That he was liable to pay the money."

Per Cur.

Take nothing by the MOTION.

Hawes,

1764.

Executer shall
pay costs of a
non pros.

Hawes, *Executrix, versus* Saunders.

THE question was, "Whether an *executor* shall pay costs
" upon a judgment of *NON PROS.*"

It came before the court in such a form as may occasion some puzzle, if not particularly attended to, in respect of the places of plaintiff and defendant being reversed: for, as I take it, the executrix was plaintiff in the first action, and defendant in the second; the state of the facts being (as far as I could collect them) as follows.

The executrix brought the original action; and was *non-pros'd* for want of declaring within time. The attorney for the original defendant came to the master, to sign the judgment of *non pros.* as in a *common* ordinary case; although the plaintiff had brought the action with an *ac etiam* as executrix: and the clerk of the judgments, as a matter of course, *without* being apprized of the plaintiff's being an executrix or suing as such, *taxed costs* against her.

UPON this judgment of *non-pros. with costs*, the original defendant brought an action against the original plaintiff; and so became *himself plaintiff* in this *second* action.

Whereupon, Mr. Stowe, on behalf of the executrix, moved for a rule to be made upon the plaintiff in this second action, for him to shew cause, "Why further proceedings in this "*second* action should not be stayed, with costs:" and in the mean time, further proceedings therein were stayed.

On *Wednesday* the 11th of *July* last, Mr. Dunning, on behalf of *Saunders*, the defendant in the first action, but now become plaintiff in the second, shewed cause; and insisted "That an executor being *non pros'd* is *liable to pay costs*."

This is entirely the executor's *own fault*: and an executor is only intitled to this privilege, in cases where the fault is *not his own*.

For this reason, he shall pay costs for not going on to trial according to his notice given.

He cited Mr. Cooke's Book of Practice in *C. B.* and *Barne's* notes in *C. B.* part 2. p. 107. *Ogle, executor, v. Moffat*---
"That

"That a plaintiff making wilful default, shall pay costs for not going on to trial; though he sues as executor."

1764.

So, in the case of *Leaves v. Mocato*, 1 Salk. 314. It was holden, "That an executor shall pay costs for not going on to trial according to his notice; though he shall not pay costs of a non-suit."

HARRIS.
SAUNDERS.
* See S. C.
cited in 1 Salk.
207. more cor-
rectly.

His proper method would have been, to have discontinued his action: in which case, he would † not have been liable to pay costs.

† See the note
below.

Mr. Stowe, *contra*, would have had it understood, "That not going on to trial according to his notice," was the single instance in which an executor should pay costs: and he cited *Baynham v. Matthews*, 2 Strange 871. where an administrator had leave to discontinue without costs. †

† Yet see Mr.
Serjeant Sayer's

Law of Costs, 87. who cites a subsequent case, "That an executor who has leave to discontinue, must pay costs; the discontinuance being always made necessary by some default of his own. Rep. Pr. in C. B. 79. Haydon v. Norton, Mich. 6 G. 2.

V. ante, p. 1451. Harris, executor, v. Jones, H. 1764. B. R. where, the giving an executor leave to discontinue was holden discretionary; and was refused, unless he would consent to pay costs.

And V. post. pa. 1927. M. 7 G. 3. Bennet (Administrator) v. Coker.

Mr. Justice YATES observed, that the case of a *non pros.* and that of a *discontinuance* differ. The former arises from the executor's own delay: and therefore he thought, and so also did LORD MANSFIELD, "That it was similar to the case of his not going on to trial according to his notice." However,

THE RULE WAS ENLARGED.

On Saturday 17th November.

Mr. Stowe, on behalf of the executrix, now said, there was no necessity to sign a judgment of *non-pros.* because (there being no declaration) the defendant might have got himself discharged for want of prosecution within two terms.

LORD MANSFIELD—The privilege of executors is too great already. They ought to be properly informed, before they bring actions. The distinction made between a discontinuance and a *non pros.* is a very good one: it is very reasonable that the executrix should pay costs in the present case.

RULE DISCHARGED.

So that the determination of the court was, "That an executor shall pay costs of a *non-pros.*" But

An

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HAWES V.
SAUNDERS.

An executor does *not* pay costs upon a *non-suit*. V. Cro.
Jac. 229. *Haywarth v. David*.

Note—The two late protonotaries of C. B. Sir George
Cooke, and Mr. *Borret*, held and acted *differently*, upon the
present question; (i. e. upon a *non-pros.*)

THIS Court now put it upon the foot of the *laches* in
the executor; this being a *non-pros.* for want of declaring in
due time.

So an executor shall pay costs, if he does not go to trial,
after having given notice of trial.

Combe, Esq; *versus* Pitt.

(1 Black Rep.

523. S. C.)

Monday, 19

Nov. 1764.

See the former branches of this Case, in pages 1335 and
1423.

An action on
the statute need
not prove all the
parties for
whom the bribe
was given, nor
that those par-
ties were can-
didates; nor the
voter's right of
voting.

THE defendant having answered over; and the cause
having been now tried, and a verdict found for the
plaintiff, but subject to the opinion of the court—

Sir *Fletcher Norton*, Solicitor General, had, upon *Thursday*
the 10th of *November* 1763, moved, on behalf of the defen-
dant, "That the verdict might be entered up for the defen-
dant:" reserving (by consent of the plaintiff's counsel)
the liberty of making a future motion, either for a new trial,
or in arrest of judgment.

At present, he insisted upon three objections against the
verdict for the plaintiff: *viz.*

1st. That the plaintiff had given no evidence to shew
"That the persons bribed or attempted to be bribed were
"VOTERS, (i. e. had a right to vote,) at the time of the of-
"fence being committed."

2d. That it did not appear by any evidence given "That
"Lord *Egmont* (who was charged to be a candidate, and for
"whom these persons were to give their votes) was then de-
"clared a candidate."

3d. That the charge was for bribing or attempting to bribe
them to vote for Mr. *Lockyer* and the *Earl of Egmont*, BY
NAME: whereas the evidence went no farther than to prove
"That

"That the bribe was given or offered, to induce them to vote for Mr. *Lockyer* and *his friend*," (generally, and without naming either Lord *Egmont* or any other friend in particular.) So that there is a *variance* between the *charge* in the declaration, and the *evidence* brought in proof of it: and the evidence is not sufficient to support the charge.

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PITT.

And he then obtained a

RULE to shew cause.

But afterwards, upon *Monday*, the 28th of *May* 1764.

THE COURT thought, and the counsel agreed, that this was a *hard* action, as the defendant had already been punished, in *some* degree, upon the * information: and therefore the motion then went off, to see if the matter could not be compromised; to which, the counsel on both sides seemed very well inclined.

* V. ante,
p. 1340.

However, the parties could not agree upon any compromise; the defendant being unable or unwilling to pay more than 50*l.* which the plaintiff was not content to accept. Whereupon.

Cause was now shewn by Mr. Serjeant *Davy*, Mr. Serjeant *Burland*, Mr. *Schubert*, and Mr. *Popham*. They thus answered the objections—

1st. The plaintiff was † not obliged to prove "That these persons had a *right* to vote:" it was enough, "That they *did* vote." Their *right* to vote was *not* *traversable*. Their being allowed to vote, was evidence proper to be left to a jury, of their right to vote. The defendant has *admitted*, that they had a right to vote: his agreement was made with them, upon the foot and admission of their having such a right; and they have actually exercised it, by voting. The *substance* is proved: the *circumstances* are immaterial. 1 *Salk.* 284. *Gallaway v. Susach*, 2 *Ro. Abr.* tit. *Trial*, p. 651. 707, 708.

† V. *Bush v.*
Rawlins, and
the *Malden*
causes in *C. B.*

2d. It is not at all material, "*Who* were the candidates declared at that time:" it is an *immaterial* allegation, not necessary to be proved: *utile per inutile non vitiatur*. It is not substance; but *only a circumstance* not necessary to be proved; as in *Batson et al. v. Sayer*. 1 *Stra.* 728. And this is a charge, not for a private, but for a *public* offence: and it is just the same offence with regard to the *public*, whether Lord *Egmont* was then declared a candidate, or not. One of the two, (Mr. *Lockyer*,) was certainly then declared a candidate: and this was undoubtedly a bribe, "To vote for *one* of the candidates." This alone was criminal, within the act.

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3d. The bribe was proved to be, "*To vote for Mr. Lockyer.*" the rest was immaterial, and therefore unnecessary to be proved. It had been sufficient, if the charge had only been, "That the bribe was to induce the person bribed or attempted to be bribed to vote for Mr. *Lockyer alone.*" for, the corrupting to vote for *either*, is a crime which the act of parliament intended to punish. Besides, it appeared in evidence, "That Lord *Egmont* was that friend of Mr. *Lockyer's*; for "whom the corrupted person was to give his vote." So that he was properly thus described; and it is tantamount to the witnesses having named him by name.

Sir *Fletcher Norton* (now Attorney General) and Mr. *Dunning*, premising, that this was a sort of criminal conviction, and in a severe action for thrice 500*l.* proceeded to support the objections.

1st. The plaintiff alledges in his declaration, "That Mr. *Lockyer* and Lord *Egmont* had declared themselves candidates; "And whilst they were candidates, the defendant *Pitt* bribed "*White, who had a right to vote, &c.*" to give his vote for "them." As the plaintiff has averred, "That the defendant bribed this man, *who had a right to vote,*" it was incumbent upon him to prove, "That the man *had* such right, "at the time of his being bribed." If he had no right, nor claimed any, it was *no offence* within the act. They have not charged any thing about his *claiming* a right, nor put the offence upon *that* foot: they have tied themselves up to his *having* such a right, by alledging "That he *had* a right &c." And this never was referred to the decision of the jury: their verdict was given upon our mutual consent "To refer the "points of law to the court." Whatever offence they *might* have charged the defendant with, he certainly is not proved guilty of the offence *as* it is charged. The evidence was contrary to the allegation. They ought to have proved "That "at the time of being bribed, he *had* a right to vote." Whereas, the evidence was, "That at *that* time he had *no* right to "vote; but was to *acquire* one in future, by 40 days *residence.*" The poll was indeed produced, to shew "That "he had *voted.*" But his subsequent voting don't prove that he had a right to vote, at the *time* when the bribe was given.

2d. They also ought to have proved "That Lord *Egmont* "had declared himself a candidate *at the time* when the bribe "was given or offered." For, they have alledged in their declaration, that it was done "*Whilst* Mr. *Lockyer* and he were "can-

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"candidates." They ought to have proved this allegation, as they have set it forth. They should have proved it to be the same offence as they have described; and with so much certainty and precision, that the defendant might be able to plead "*autrefois acquit*," in case of another action's being brought against him for it. The bribing "*Whilst Lord Egmont was a candidate*," is the offence here charged: and this could not be pleaded to an action for bribing &c, at another time, when he was not a candidate. It is a material substantial part of the charge: and the defendant might have traversed that he did it *whilst* they were candidates. In fact, Lord Egmont was so far from being a candidate at that time, that he was not then thought of.

3d. The plaintiff alleges in his declaration, "That the bribe was to induce *White* to vote for Mr. Lockyer and Lord Egmont." It was incumbent upon him to prove this, as said. But this he neither did do, nor could do: for, in truth, it was uncertain at that time, who Mr. Lockyer's friend would be; and Lord Egmont was not so much as thought on. It was impossible, therefore, that the term "Mr. Lockyer's friend," could mean or be applied to any particular person; much less, to Lord Egmont.

LORD MANSFIELD—The defendant was convicted upon an INFORMATION granted by the court, for this same offence; and when the court gave sentence upon it, they considered him as remaining still liable to the forfeitures and disabilities directed by the act of parliament, and to the civil action which might be brought upon that act; as the time limited for commencing prosecutions upon it was not then expired. The court will never interpose again, by way of INFORMATION, whilst the matter remains open to the civil action. However, in this man's case, it did so happen: and the hardship of his being doubly punished for the same offence had some weight at the assizes, in not leaving the matter to the jury. The same inclination has operated with us here; and we wished a compromise. This wish is now desperate: I am sorry for it. But since it is so, the law must have its course; we must not make a precedent in opposition to the statute.

I have no doubt, as to any of the three objections that have been made. In penal actions, the material fact must be charged; and a fact must be proved in such a manner, that all those consequences will follow the verdict, which ought to attend it. But aggravations, and all circumstances that do not vary the offence, are out of the case, as to the necessity of proving them.

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CARR v.
PITT.

18. Object.

A man who has given money to another *for his vote*, shall not be admitted to say, "That such other person had no right to vote." However, it appears that *this person had a right to vote*; unless he should lose it by non-residence: and he appears, upon the poll, to have actually voted.

21. Object.

"Candidate," is a vague term: no certain idea is fixed, by law, to it. But *Mr. Lockyer* was certainly a candidate: and this was a bribe to induce *White* to vote for *him*, at least. Surely, *asking a vote* for a man, is enough to make him a candidate. *Lockyer* was clearly a candidate himself: and the bribe was, "To vote for *him and his friend*."

34. Object.

The bribing to vote for one or both or either of these persons, is criminal within the act: and, if proved, is sufficient. And here it is proved, "That the bribe was, to give his vote for *Mr. Lockyer*."

Therefore, upon the whole, the verdict ought to stand.

Mr. Justice WILMOT (who tried the cause) owned, he had wished for an accommodation; because the man would be twice punished for the same offence; though that upon the criminal information was inflicted with lenity, on account of the man's remaining still liable to a civil action.

As to the objections, he said, he had not nor had had any doubt, in the least degree.

1st. Object.

The giving *White* the bribe *for his vote*, admits his having a right to vote: and it was proved by the poll, "That he *did* vote."

2d. ? Object.
3d. }

There is no real variance between the *material and substantial* charge, and the evidence. The material and substantial charge is bribing this man "To vote for *Mr. Lockyer*, and *another*, at the election." The material offence is bribing to give a vote for *Mr. Lockyer* then a candidate: and I think it is pointed out so certainly, that it *might* be pleaded in bar to any other action brought for the offence of bribing *at this election*.

Mr. Justice YATES expressed the like sentiments with Lord MANSFIELD and Mr. Justice WILMOT. He thought it a reflection upon the plaintiff's humanity, to proceed with rigour for a second punishment for the same offence. But he had no difficulty as to the force of the objections.

A right

A right to vote is *admitted*, by bribing him to give his vote. And it was proved by the poll, "That the man *did* vote:" which is a presumption of his having a right to vote. But it is *totally immaterial*, "Whether he had a *right* to vote, or "not;" because the act of parliament says*, "That if any "person who hath or *claimeth* to have, or hereafter shall have "or *claim* to have any right to vote &c, shall take &c; or if "any person &c, shall, by &c, corrupt or procure any person "or persons to give his or their vote or votes &c:" and this man certainly *claimed* a right to vote, and did vote.

Such a *traverse* as has been mentioned, "That the defend-
"ant did not give or offer the bribe *whilst* these persons
"were candidates," would have been *bad*; because it would
not apply to the *material* offence.

Id certum est quod certum reddi potest. The Earl of Egmont
was known, at the time of the election, to be the other candi-
diate. The offence described by the statute is "Corrupt-
"ing or procuring any person or persons to give his or their
"vote or votes in *any election of any member or members* to serve
"in parliament:† and the crime and the penalty are the
same, whether the bribe be given "To vote for *one*," or "To
"vote for *both*." This is not so tied down by the particular
description, that a recovery in this action could not be pleaded
in bar to another action for bribing at this election. For, it
might be so pleaded in bar: and the fact might be identified
to be the *same*, by proper *averments*.

Per Cur. unanimously,

THIS RULE WAS DISCHARGED;

And the VERDICT ordered to STAND.

But liberty was reserved (as is abovementioned to have
been agreed) for the defendant's counsel to move either for a
new trial; or in arrest of this judgment.

And they afterwards moved for a new trial.

V. post. pa. 1682.

1764.

COMES V.
PITT.

1st. Object.

* V. 2 G. 2.

c. 24. § 7.

2d. Object.

3d. Object.

† V. § 6.
and § 7. taken
together.

1592

Michaelmas Term 5 Geo. 3. B. R.

1764

Oulton, the Younger, *versus* Perry.

Tuesday, 20
Nov. 1764.

Proceedings will
not be stayed,
because the
cause of action
is *infra dignita-*
tem curiæ, up-
on the mere af-
fidavit of defen-
dant.

MR. Barnes, on behalf of the defendant, moved to stay the plaintiff's proceedings, upon an affidavit "That the defendant owed the plaintiff only *nine shillings*;" and cited the case of *Machin v. Robinson*, Tr. 28 G. 2. B. R. where the proceedings were stayed, because the cause of action was so trifling, being only for 20 s. It was therefore holden to be *infra dignitatem curiæ*.

Per Cur. and Master Owen—There, it appeared upon the very face of the declaration. Here, the plaintiff demands more; the defendant alleges it to be less: the court cannot try the *quantum*, upon affidavit. The distinction is, where it appears upon the face of the declaration, or not.

MOTION DENIED.

N. B. Master Owen said, that Lord Hardwicke had, at first, made some rules of this kind; but afterwards, would not make any more.

Thursday, 22
Nov. 1764.

Action lies for
shipwright for
work and and
labour done, and
materials deli-
vered in repair-
ing ship, though
burnt in dock
before repairs
completed.

Menetone *versus* Athawes.

THIS was an action by a ship-wright for work and labour done and materials provided, in repairing the defendant's ship. And the question was, "Whether the plaintiff was intitled to recover, under the following circumstances."

The ship, being damaged, was obliged to put back, in order to be repaired in dock; and was to have gone out of the dock on a Sunday: in the interim, viz. on the day before, and when only 3 hours work was wanting to complete the repair, a fire happened at an adjacent brew-house, and was communicated to the dock; and the ship was burnt.

N. B. It was the ship-wright's own dock? and the owner of the ship had agreed to pay him 5 l. for the use of it.

This case was argued on Tuesday the 13th of this month by Mr. Murphy, for the plaintiff; and Mr. Dunning, for the defendant.

For

For the plaintiff, it was insisted that *he* was not answerable for this event, which happened without his neglect or default; unless there had been some *special* undertaking.

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ATHAWIS.

Indeed, a tenant is bound to provide the landlord as good a house, in case of it's being burnt, *if* he covenants to deliver up the house to him again, in as good repair as it was then: upon such a *special* undertaking, an action would lie: but *not otherwise*. Doctor and Student, dialogue 2. chap. 4.

In the case of waggoners and common carriers, they are bound to answer for the goods against all events, but acts of God, and of the enemies of the king. 2 *Ld. Raym.* 909. *Coggs v. Bernard.* 1 *Strange* 128. *Amies v. Stephens.* And a gaoler is excusable from escapes in those cases: 1 *Ro. Abr.* 808. *pl.* 5, 6. And in like manner, where it is the act of God, the person who has the custody of another man's property, is excused.

The plaintiff here was a general bailee, only: therefore not chargeable. 1 *Inst.* 89. He was only obliged to keep it as he would keep his own.

The case of *Coggs v. Bernard* in 2 *Ld. Raym.* 909, overrules *Southcote's* case in 4 *Co.* 84.

Even a pawn remains the property of the original owner. 2 *Str.* 1187. *Sir John Hartopp v. Hoare*: the plaintiff was considered as a mere bailee, for safe custody only.

In insurances made by merchants, it is usual to insert docks. The men were on board of this ship: (though that makes no difference.)

The plaintiff therefore was not answerable for this loss of the ship. And if the plaintiff be not liable for the loss of the ship, he is intitled to be paid for his work and materials. The materials must be considered as having been delivered. The merchant always pays 5 *l.* for the hire of a dock: and so he agreed to do in this case. And these materials were delivered on board his ship in this dock.

When tithes are set out, they are thereby vested in the parson; and he may maintain trespass for any injury done to them.

The defendant might have sold this ship, while it was in the dock; and these materials would have been part of it:

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ATHAWES.

The fixing them to the ship was a delivery of them. The adjunct must go with the subject. Dr. *Corwell*, in treating of the various modes of acquiring property, is of this opinion.

Mr. *Dunning*, *contra*, for the defendant.

The question is, "Whether the plaintiff is intitled to be paid by the defendant for *that* work and labour from which the defendant neither did nor could reap any *advantage*."

The plaintiff was obliged to re-deliver the ship safe; having undertaken to repair it.

The defendant has had *no benefit* from the plaintiff's labour or materials; neither was the plaintiff's undertaking *completely* performed.

Carriers and hoy-men can not be intitled to be paid for carrying things that perish *before* they are delivered: nor jewelers, for setting a jewel, that is destroyed *before* it is set. So a taylor; where the cloth is destroyed *before* the suit is finished. So, of any *unfinished incomplete* undertaking.

As there is no express agreement to support this action, the court will not imply any.

Mr. *Murphy*—in reply. As to the defendant's not having had the *benefit* of the repair—There is no reason why the shipwright should not be paid for his *work and labour and materials*. *Digest*, title *de negotiis gestis*. The defendant might have insured his ship.

Nothing can be due to a carrier or hoyman, *till the delivery* of the goods at the destined place. But these materials *were delivered*; and the work and labour *actually done*?

Suppose a horse sent to a farrier's to be cured, is burnt in the stable before the cure is completely effected: shall not the farrier be paid for what he has *already done*?

A pawn-broker, if the pawn is destroyed by the act of God, shall recover the money lent.

Lord MANSFIELD—This is a desperate case for the defendant (though compassionate :) I doubt it is very difficult for him to maintain his point. Besides, it is stated, "That he paid 5 *l.* for the *use* of the dock,"

Mr.

Mr. JUSTICE WILMOT—So that it is like a horse that a farrier was curing, being burnt in the owner's *own* stable.

1764.

MEMORANDUM
ATHAWES.

Mr. ATTORNEY GENERAL being retained to argue it for the defendant—

THE COURT offered to hear a second argument from him, if he thought he could maintain his case; but seemed to think it would be a very difficult matter to do it.

Mr. ATTORNEY GENERAL appeared to entertain very little hope of success: however, he desired a day or two to consider of it. But

Mr. RECORDER now moving “That the *possea* might be delivered to the plaintiff”—

The attorney general did not oppose it.

And a RULE was made accordingly,

That the *possea* be delivered to the PLAINTIFF.

Swann *versus* Broome.

THIS came before the court, upon a writ of error from the court of *Common Pleas*, upon a common recovery suffered there.

(1 Black. Rep.
496. 526. S. C.)
Wednesday,
28 Nov. 1764.
If return of
writ of sum-
mons in com-
mon recovery
be on Sunday,
and vouchee
dies on that
day, the reco-
very is bad.

By consent, the error assigned was in *this*, “That the day of the return of the writ of summons was on *Sunday* the 13th of *May* 1750: on which said 13th. day of *May*, *Edward Swann* the younger, tenant in tail male, and vouchee in the common recovery, DIED *without issue male* of his body.”

On 3d. *July* 1764, the case was argued, by Mr. Serjeant *Hewitt* for the plaintiff, and Mr. *Walker* for the defendant; and on the 9th. of *November* 1764, by Mr. *Blackstone* for the plaintiff, and Mr. Serjeant *Glynn* for the defendant.

THE COURT, from the beginning, shewed a strong inclination to support the recovery, if possible.

The questions were *two*:

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1st. "Whether the judgment could relate to the effoin-day of the term; or to any day prior to the 13th of May, the effoin-day of the return."

2d. "Whether, by law, a *valid* judgment could possibly be given on the day of the return, being SUNDAY."

THE ARGUMENTS at the bar were of great length; and every authority relative to judicial proceedings upon a Sunday, ransacked on both sides: but it would be of no use, now, to report them at large.

LORD MANSFIELD now delivered the resolution of the court, "That the recovery was *bad*; because no judgment could be supposed to be given before the death of the tenant in tail. That this judgment could not relate to the first day of the term; because it could not be given before the return of the writ of summons, which appears by the record to be in the term. That it could relate only to the effoin-day of the writ of summons, which was upon a Sunday; on which Sunday, the tenant in tail died."

HIS LORDSHIP also gave the reasons upon which this opinion was grounded: which were somewhat to the following effect.

"This is a writ of error upon a judgment in the court of *Common Pleas* in a common recovery. The fact, as it appears upon the record is, "That the writ of summons was returnable at a return-day *within* the term; and the tenant in tail died upon the effoin-day of that return; which effoin-day happened on a Sunday." This is all that is necessary to be stated.

Though common recoveries are now considered as common assurances, yet they must be conducted and completed according to certain ceremonies and solemnities which bear analogy to the proceedings in real actions: and the want of such necessary ceremonies and solemnities invalidates a common recovery, as much as the want of a third witness invalidates a will of lands.

A judgment relates to the effoin-day of the term, *unless* any thing appears upon the record to the contrary, shewing "That the judgment can *not* have that relation."

If the tenant in tail was alive when the judgment was given or may be supposed to have been given, such judgment is *good*:

good: If not, then it is a *bad* judgment, because given *after* the death of the tenant in tail.

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BROOKES.

Where it appears upon the face of the record, that the relation *could not* be to the *essoin-day* of the term, but to a *subsequent* day, the *presumption* of such relation must *cease*; because it can not possibly be supposed or intended "That it *was* given upon that day," when it appears upon the face of the record impossible that it *could* be so.

Where any such matter is apparent upon the face of the record, the judgment then relates *only so far back*, as it may, *consistently with the record*, be intended or supposed to relate.

If the *essoin-day* of this writ of summons had been upon a *week-day*, the judgment would, by relation, have been a *good* one; because it *might then* have been intended or supposed "That it *was* really given upon the day to which it related."

But *this* *essoin-day* of the writ of summons is upon a *Sunday*; and from thence the objection arises; it being insisted, on the part of the plaintiff in error, "That judgment *could not* be given upon a *Sunday*."

It is clear, that *if the court could not sit* on a *Sunday*, it would be impossible for this judgment to have been given before the death of the tenant in tail: for, he died *upon* that *Sunday*.

The single question therefore is, "Whether the court *can sit on a Sunday*, and give a *valid judgment*."

No express direct authority has been cited in proof of the affirmative side of this question. Those authorities that have been urged in support of it, have been only *argumentative*; from whence such a conclusion might, as it is said, be drawn.

BUT the *history* of the law and usage, as to courts of justice sitting on *Sundays*, makes an end of the question.

ANCIENTLY, the courts of justice *did* sit on *Sundays*.

The *fact* of this, and the *reasons* of it, appear in Sir Henry Spelman's Original of the Terms.

It appears by what he says, that the ancient Christians practised this. In his * chapter of law-days among the first Christians, using all times alike, he says, "The Christians, at first, * c. 3: p. 73.
" used

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BROOMS.

"used all days alike for hearing of causes; not sparing (as it seemeth) the *Sunday* itself." They had two reasons for it. One was, in opposition to the Heathens; who were superstitious about the observation of days and times, conceiving some to be ominous and unlucky, and others to be lucky: and therefore the Christians laid aside *all* observance of days. A second reason they also had: which was, by keeping their own courts *always open*, to prevent Christian suitors from resorting to the Heathen courts.

a. v. c. 4.
p. 76.

But in the year 517, a *canon* was made, "*Quod nullus episcopus vel infra positus die dominico causas judicare præsumat.*" And this canon (for exempting *Sundays*) was ratified in the time of *Theodosius*; who fortified it with an Imperial constitution: "*Solis die, (quem dominicum rectè dixere majores,) omnium omnino litium et negotiorum quiescat intentio.*" The whole canon is also decreed verbatim, in the capitulars of the emperors *Carolus* and *Ludovicus*.

† V. c. 5.
p. 76, 77.

There are likewise several other canons taken notice of, in *Spelman's Original of the Terms*. † One of them was made in the council of *Tribury*, about the year 895: "*Nullus comes, nullusque omnino secularis, diebus dominicis, vel sanctorum in festis, seu quadragesimæ, aut jejuniorum, placitum habere, sed nec populum illo præsumat cohercere.*" Another of them was made in the council of *Erpfurd* in the year 932; and afterwards became general, upon being taken into the body of the canon law, by *Gratian*: and Sir *Henry Spelman* takes it, he says, to be one of the foundation-stones to our terms, "*Placita secularia dominicis vel alijs festis diebus, seu etiam in quibus legitima jejunia celebrantur secundum canonicam institutionem minime fieri volumus.*" It goes on and appoints vacations. But these vacations were enlarged by the council of *St. Medard*: "*Decrevit sancta synodus, ut à quadragesima usque ad octavam Paschæ, et ab adventu Domini usque ad octavam Epiphaniæ, necnon in jejunijs quatuor temporum, et in litijs majoribus, et in diebus dominicis, et in diebus rogationum (nisi de concordia et pacificatione) nullus supra sacra evangelia jurare præsumat.*" By which expression is meant, that no causes should be tried, or pleas holden, on those days.

† V. c. 7, 8.
p. 77, 78.
and c. 9. p. 79.
|| V. Leg. Ed.
Conf. c. 9.

These canons were received and adopted by our *Saxon* kings. † And *Edward* the Confessor made the following constitution: || "*Ab adventu Domini usque ad octabas Epiphaniæ, pax Dei et sanctæ ecclesiæ per omne regnum; similiter, à septuagesima usque ad octabas Paschæ; item, ab ascensione Domini usque ad octabas Pentecostes; item, omnibus diebus quatuor temporum; item, omnibus Sab-*

"batis ab hora nona, ET TOTA DIE SEQUENTI USQUE AD
"DIEM LUNE; item, vigils &c."

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These canons and constitutions were all confirmed by William the Conqueror and Henry the Second; and so became part of the common law of England.

* V. c. 10.
p. 80. & c. 11.
p. 81.

Afterwards, in succeeding times, there happened several alterations and relaxations. The statute of *Westminster* the first, and other statutes, were made to this purpose; and usage, or perhaps positive laws not now extant, dispensed with other days that were formerly unjuridical.

† 3 Ed. 1.
c. 51.

The *Mirroure of Justices* † says, "Abusion est que tient
"pleas per *dimenches*, ou per auters jours defendus, ou de-
"vant le soleil levie, ou noëstantre, ou in dishonest lieu."

† c. 5. § 1.
artic. 111.

Lord Coke, in his 2d. Institute, p. 264. commenting upon *W. 1. c. 51.* says, "In the common law, there be dies juridici, and dies non juridici. Dies non juridici sunt dies dominici, the Lord's days, throughout the whole year."

In *Dyer* 168. pl. 17. upon a judgment given in the *Common Pleas* in a *scire facias* upon a recognizance, error was assigned in that the teste of the *scire facias* was upon a Sunday, which is not *dies juridicus* in banco; the teste being the 28th. of November, which happening that year on Sunday, the term did not end till the 29th.

In Sir William Jones 156. *Becloe v. Alpe*, upon an information in the *Exchequer*, for ingrossing butter and cheese contrary to the statute of 5, 6 E. 6. and a verdict and judgment against the defendant, and a writ of error brought by him in the *Exchequer* chamber to reverse it, and a reference of it by the court to Hutton and Jones; the first error assigned was "That the information was exhibited in court on the 13th. of October, which in that year (20 Jac. 1.) was a Sunday and therefore not *dies juridicus*." But it was resolved by Hutton and Jones, that it was good: for, although it was not *dies juridicus* for the award of any judicial process, or to make an entry of any judgment on record, yet it was good for accepting an information upon a special law; (of which kind of informations many precedents were shewn.) And upon Hutton's delivering his own and Jones's opinion to the court, they affirmed the first judgment, notwithstanding the errors. But at the same time that these two judges held it good for accepting an information upon a special law, they said, "That Sunday was not a
"dies

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" *dies juridicus* for the awarding of any judicial process, nor for "entering any judgment of record." The awarding of process, and the giving of judgment, are judicial acts; and therefore can not be supposed to be done, but *whilst* the court is actually sitting.

As to WRITS being returnable on Sundays—

Writs were formed in those times when the courts of justice might sit on Sundays: and these antient returns, which were not improper when the writs were first formed, have continued ever since, without being altered in succeeding times. The *canons* did not at all interfere, so as to make any alteration in them: for the *canons* extend their prohibition no further than against awarding process and giving judgment, and such like acts of court, on Sundays. So that the writs have continued in their primitive form: but no business can be done by the court, till Monday. The day of their being actually returned, is therefore as certainly known, as if the writs were made returnable on Monday.

* Old edition,
p. 17;
New edition,
p. 36.

Fitz-Herbert, in his *Natura Brevium*, under the writ *de warrantia diei*, * (to excuse the default of appearance in court at the day assigned, on account of being in the king's service on that day,) specifies one of those writs in these words—"Rex &c. sciatis quod A. fuit in servitio nostro die "LUNE in crastino quinden' Pasche proxim' præterit'; ita quod "eo die interesse non potuit loquelæ quæ est inter &c."

In 12 Edw. 4. 8. b. pl. 22. upon a demurrer, in an action of trespass brought by the prior of Lantony, Pigott said "If the day of a return, *scilicet* the *quarto die*, falls in *die dominico*, no court shall be holden, but in the day following."

As to the practice of giving notice "To appear on the Sunday"—

The answer is, that *whilst* the courts did sit upon Sundays, the notice must follow the practice then in use; and must of consequence, be given for appearing on the Sunday: but now, that old practice "Of their actually sitting upon Sunday" being altered and at an end, these notices must necessarily relate to the Monday, when the courts do sit, and before which day they cannot sit; and therefore the defendant can't be misled by having notice given him "To appear on the Sunday."

As to the observation, "That the courts of justice have never been restrained by act of parliament, from sitting on Sundays; "and

"and that the 29th. of C. 2. c. 7. does not extend to giving judgments"—

It was needless to restrain them from it by act of parliament. They could not do it, by the canons anciently received, and made a part of the law of the land: and therefore the restraining them from it by act of parliament, would have been merely *nugatory*. But fairs, markets, sports and pastimes, were *not* unlawful to be holden and used on *Sundays*, at *common law*: and therefore it was requisite to enact particular statutes, to prohibit the use and exercise of *them* upon *Sundays*, as there was nothing else that could hinder their being continued in use.

In *Mackalley's case*, in 9 Co. * It was objected, that *Sunday* • v. p. 66. b. "is not *dies juridicus*; and therefore no arrest can be made in it: and every one ought to abstain from secular affairs upon that day." But it was answered and resolved, "That *no judicial act* ought to be done in that day: but *misferial acts* may be lawfully executed in the *Sunday*."

It has been said, "That a mere *ideal* relation to *Sunday* "could not come within the notion of a profanation of the "day; as it is only a fiction of law, not founded upon an "actual fact of the court's really sitting and giving judgment upon that day."

But the answer to this, is, that *if* it be *impossible* for the court to sit on a *Sunday*, then there *can* be no such relation: for, an absolute impossibility can not be supposed.

It has been said, "That the tenant in tail had done all that "was *essential* for him to do: the rest was only *form*."

The answer is—The law requires, as *essentially necessary* to *validate* a common recovery, certain forms, solemnities or ceremonies that have analogy to real suits: it makes these requisites absolutely and essentially necessary to the *completion* of it. And *till* it is *completed*, it is *no* recovery, *no* conveyance: the tenant in tail has not regularly and properly *executed* the conveyance by which he would cut off the intail, defeat his own issue, and bar the remainders. A conveyance not properly executed is the same as *no* conveyance at all. Here, he died *before the return* of the writ of summons, and before he either did or could *appear* to it: for, though the writ is, in words, made returnable on the *Sunday*; yet, as the court could not sit on *Sunday*, he could not possibly appear to it before *Monday*.

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On the face of this record, it is manifest, that the tenant in tail *could not* have appeared till *Monday*: and no judgment could be given against him *till* he had appeared. It is impossible therefore that this judgment could be given before *Monday*. But he died on *Sunday*. Consequently, the judgment appears to have been in fact given *after the death* of the tenant in tail.

WE are very sorry to find ourselves *obliged* to reverse a common recovery, upon such an objection to it: and we have struggled hard, to try if it could, by any *legal* means, be supported. But, notwithstanding our inclinations to support it, we can not help declaring our opinion, "That, in point of *law*, this judgment is *ERRONEOUS*, and ought to be reversed."

JUDGMENT REVERSED.

A writ of error was brought in parliament upon this judgment: and after hearing it, upon the 2d of *May* 1766, the lords proposed the following question, which was put to the judges, *viz.*

"Whether the recovery is good or erroneous; the return day of the writ of summons being on *SUNDAY* the 13th. day of *May*; on which day, *Edward Swann* the younger died."

THE LORD CHIEF BARON delivered the unanimous opinion of the judges, "That the recovery is *ERRONEOUS*."

ORDERED AND ADJUDGED, that the judgment of the court of king's bench be *AFFIRMED*; and that the record be *remitted*; to the end such proceeding may be had thereupon, as if no such writ of error had been brought into this house.

The End of Michaelmas Term 1764. 5 G. 3.

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Hilary Term.

5 Geo. 3. B. R. 1765.

Timmins *versus* Rowlinson.

(1 Black. Rep.
533. S. C.)

Friday, 25 Jan.
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Parol notice to
quit by a tenant
under a parol
lease is suffi-
cient.

THIS was a case reserved from the last *Lent* assizes for the county of *Stafford*.

It was an action in replevin, for taking the plaintiff's goods, cattle, &c.

The defendant avowed ; first, for that he was seised in fee, of the *locus in quo* : and that the cattle were damage-feasant there. Secondly, that the defendant was seised in fee ; and on 6th. *April* 1760, demised to the plaintiff for one year from the 5th. of the same month of *April*, at the yearly rent of 19*l.* 10*s.* payable half-yearly, on 10th. *October* and 5th *April* : and that the plaintiff entered, and held under that demise till the 5th of *April* 1761. That before the said 5th of *April*, to wit on the 1st of *January* 1761, the plaintiff gave notice to the defendant, " That he would quit and deliver up possession of the premises on the said 5th of *April* " 1761" : but he did not quit, pursuant to such notice ; but held over till the 10th of *October* in the same year. That the yearly value of the premises was 19*l.* 10*s.* And so avows for 19*l.* 10*s.* being double the value of the premises for half a year ended upon the said 10th. of *October* 1761.

The plaintiff in bar to the first part of the avowry, pleaded a demise from the defendant, of the *locus in quo*, for one year, from the 5th. of *April* 1760 ; and so from year to year, as long as both parties should please : under which demise, he rightfully put in his cattle, and placed his goods and chattels there : and the defendant wrongfully took them. AND as to the second part of the avowry, he pleads the like demise ;

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and

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and *traverses* " that he gave notice to the defendant to quit
" and deliver up the possession of the said premises on the
" said 5th of *April* 1761," as is alledged in the said avowry.

The AVOWANT, by his replication to the first part of the
plaintiff in replevin's plea in bar to the avowry, denies that
he demised to the plaintiff in replevin, in the manner
therein mentioned; and issue was joined thereupon. And
as to the *second* part of the said plea in bar, he takes issue
upon the *traverse*.

The cause was tried, as above. And

It appeared in evidence, at the the trial, that the plaintiff
held the premises for one year, from the 5th of *April* 1760;
and so from year to year, as long as both parties should
please; but that such demise was only by *parol*: and that
the *notice* proved to be given by the plaintiff to the defen-
dant " to quit on the 5th of *April* 1761," was only a *parol*
one, and not " in writing."

A verdict was found for the plaintiff, on the first issue;
and for the defendant, on the second issue (as to the notice
to quit,) subject to the opinion of this court, upon these
questions—

1st. Whether the plaintiff was liable to pay double rent
for not quitting, after having given a notice to do so, by
PAROL only.

2dly. Whether, as the plaintiff held under a *parol demise*,
as tenant from year to year, this is *such a holding* as is
within the statute of 11 G. 2. c. 19. s. 18. so as to subject
the plaintiff to *double rent*, for his not quitting after having
given notice " That he would do so."

This case was first argued on *Tuesday* the 13th of *November*
last, by Mr. *Ashburst* for the avowant, and Mr. *Storwe* for the
tenant (the plaintiff in replevin;) and again now, by Mr.
Price for the avowant, and Mr. Serjeant *Nares* for the te-
nant, the plaintiff in replevin.

1st. Point.

For the defendant or avowant, cases were cited to prove
that statutes ought to be construed *liberally*; and that the con-
struction should be extended *beyond the words of the preamble*,
in order to advance the remedy and suppress the mischief.

Here the particular mischief was the inconvenience to
landlords when their tenants would not quit, after the land-
lord had agreed with *another* tenant.

The double yearly value under the act of 4 G. 2. c. 28.* is payable upon notice given by the LANDLORD; and must be sued for. The double rent under the 11 G. 2. c. 19. † is upon notice given by the TENANT; and may be levied, sued for, or recovered, in the same manner as the former rent.

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ROWLINSON.* Sect. 1.
† V. Sect. 13.

Therefore this latter act means to remedy a substantive mischief, arising from a *breach of faith* in the tenant. It is not a mere *mutual* remedy given by this statute, upon the tenant's notice, as it was by the former, upon the landlord's notice.

The act of 8 Ann. c. 14. is also in favour of landlords.

This act of 11 G. 2. c. 19. is not confined to the case of those leases only, wherein the tenant has liberty to quit at the end of 7, 14, or 21 years: it is *general*, "In case † any † V. Sect. 13. "tenant or tenants shall give notice, &c."

The present case is a notice by the tenant. A landlord can not *oblige* his tenant to give the notice in *writing*: therefore notice by *parol* must be within the remedy intended. And here was *parol* notice given by the tenant, of quitting: yet the tenant did not quit.

2d. Point. Whether this, being a lease by *parol*, be *such* 2d. Point; a *holding* as is within 11 G. 2. c. 19. § 13.

This is clearly a lease and a holding within this act.

It is not necessary that a lease should be a *deed*. "Lease" is synonymous to "Demise." *Litt.* § 57. They cited also 1 *Strange* 651. *Ryley v. Hicks*; and *Sheppard's Touchstone* of Common Assurances.

It may be objected, "That this being a *penal* statute, it "ought not to be extended by *intendment*".

But it is *pro bono publico*; and therefore shall be extended by equity. *Plowd.* 36. b. expressly. 2 *Inst.* 648, 649. (an exposition upon 2 *Ed.* 6. c. 13. of tithes;) where the case of *Heale v. Spratt* is cited; which was adjudged to be fraud and guile within that act; although he justly divided the tithes within the letter of it.

This is a LEASE, both within the words and meaning of this statute. The words are—"The premises by him her

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"or

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"or them holden": and it means to advance the remedies of landjords.

For the plaintiff in replevin, it was insisted, that all acts of parliament relative to the same subject must be construed together: and it must be supposed, that the parliament had the former *in view*, when they made the latter.

The 11 G. 2. c. 19. was made *in pari materia* with 4 G. 2. c. 28. Therefore they must be considered together, as one law or one system of laws. The title of each is alike, very nearly.

The former act (4 G. 2.) requires notice *in writing*. Therefore, on the second act (11 G. 2.) the notice ought also to be *in writing*. The words of this latter act are—"At a time mentioned in such notice;" and "At the time CONTAINED in such notice": which words shew, that the parliament must have meant "That it should be a notice in *writing*." The words—"Shall from thenceforward pay" also shew this; because it amounts to a new contract: it virtually makes a new demise, from the time of holding over; and gives the same remedy as for the old rent. Therefore it is right and reasonable that it should be in writing, as being liable to no uncertainty.

Parol notices must be attended with very great inconvenience; and may be *extremely difficult to prove*.

Requiring a *written* notice would be better both for landlord and tenant: it would give the former a clearer proof; and make the latter more cautious.

To prove "That these two statutes must be construed together," they cited 1 Ventr. 246. and Wallis v. Hodson, before Lord Hardwicke, 24 Jan. 1740. and Ren v. Loxdale, Hil. 31 G. 2. B. R.*

* V. ante pt. 4.
Vol. 1. p. 447.

2d. Point.

As to the 2d. point—They inferred from the words in the preamble—"Landlords whose tenants have power to determine their leases by giving notice to quit the premises by them holden," that the legislature had in view *only* such tenants as have, by a clause frequently inserted in leases, an *express* power to quit, at the end of 7, 11, or 14 years, upon giving notice to their landlords.

Lord

Lord MANSFIELD, upon the first argument, ordered it to stand for another; because it was a *new* question.

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HIS LORDSHIP, after the second argument, declared, that he had no doubt of the true construction, on the former argument.

The rule that has been mentioned, of construing acts of parliament made *in pari materia*, is right: all of them ought to be considered as *one system*.

But on considering both these acts together, it will appear, that though the case intended to be provided against under the former act, is both inconvenient to the landlord, and unjust and vexatious in the tenant; yet on the latter act, the case is still *stronger* against the tenant, as being more vexatious, where he himself gives the notice and then departs from it.

And as it is notorious, that an infinite quantity of land is holden in this kingdom, *without* lease; therefore it is an extensive case, and proper to be remedied:

In the 4 G. 2. the provision was for those cases where the landlord gave the tenant notice to quit. This of the 11th of G. 2. provides for the case of the TENANT's giving his landlord the notice of his intention to quit, and not delivering up possession according to it. The title of the act is almost the same as the former. One is "For the more effectual preventing frauds committed by tenants, and for the more easy recovery of rents &c": the other, "For the more effectual securing the payment of rents, and preventing frauds by tenants."

There is no reason to confine this power given to tenants by the latter act, of quitting their leases upon notice, to *written notices*. The words of it are general: *this act* does not say, that the notice shall be *in writing*. The legislature were then considering the former act, which *was* tied down to a notice *in writing*, to be given by the landlord: but they purposely left it out here.

It is said, "That parol notice may be very difficult to prove." But the difficulty of *proof* of a parol notice is not a sufficient answer: for here, the notice is in fact traversed and proved.

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'Tis clearly within the words; and 'tis also within the meaning, and within the reason of the act; and within the justice of the case.

Mr. Justice WILMOT concurred; and was of the same opinion, he said, at the first argument.

The 1st. question is, whether the tenant's notice must be *in writing*.

The 2d. question is, whether this is such a tenant as to be subject to pay a double rent for not quitting after he has given the notice.

First. The act of the 11th year of the late king is penned differently from that of the 4th; and seems to have been *designed* to lay a less restraint upon the notice to be given by the tenant, of his intention to quit, than the former act had laid upon the landlord, in obliging him to give notice *in writing* to his tenant "To deliver possession."

This different penning will appear, if you compare the acts together.

The former does not give double the *rent*, as the latter does; but "double the yearly *VALUE of the estate*"; be the *rent* what it will: (double the *rent* might not have been an equivalent,) and for *that* reason, it was necessary that it should be recovered by *action* and not by *distress*.

The former is worded—"After demand made, and notice *in writing* given." And the reason is much stronger, for obliging the *landlord* to give notice *in writing*, than for obliging the *tenant* to do so: for landlords generally *can* write; tenants, in the country, very seldom can. And there are other good grounds for requiring the landlord's notice to be *in writing*, which do not hold with regard to the tenant's notice.

The ease or the difficulty of proving is just the same, be it the one's notice, or the other's.

It has been said, that the expressions of "*mentioned* in the notice," and "*contained* in the notice," shew that the legislature meant a notice *in writing*. Now the word "*mentioned*" is equivalent to "*contained*" in such notice. But neither of them prove that the notice must necessarily be *in writing*.

One notice is *expressly* required to be in writing : the other, *purposely* (I believe) *not* required to be in writing.

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Secondly—As to the question whether *this class* of tenants be within the act of 11 G. 2. c. 19. section the 18th.

I think them both within the *preamble*, and the *enacting* part of this section. I should *not* have *confined* it to the *preamble*, even if it *had* been so restrained as has been urged at the bar, when the *enacting* clause was *general* : but the *preamble* is *not* so restrained, as has been supposed ; nor will the inference hold, that has been drawn from it.

In the country, leases at will, in the *strict* legal notion of a lease at will, being found extremely inconvenient, exist only notionally ; and were succeeded by another species of contract, which was less inconvenient. At first, it was indeed settled to be for a year certain : and then, the landlord might turn the tenant out at the end of the year. It is now established, that if a tenant takes from year to year, *either* party must give a *reasonable* notice, before the end of the year ; though that reasonable notice *varies*, according to the custom of different counties.

This practice, established by judges upon circuits, does make them “ Tenants having power to determine their leases, “ by giving notice to quit,” in the words of the preamble. * * See § 11. And it is immaterial, whether the lease be for one, or more years ; or in writing, or not in writing. But the words of the enacting clause are much more large and liberal : the words there used are—“ In case *any* tenant or tenants shall “ give notice of his her or their intention to quit the pre- “ mises by him her or them holden, at a time *mentioned* in “ such notice ; and shall not accordingly deliver up the pos- “ session thereof at the time in such notice contained ; that “ then, &c.” It is, clearly, equally within the mischief intended to be remedied : and, I think it is within the *words* of the *preamble*. But, at least, it is within both the *words* and *meaning* of the *enacting* clause.

Therefore I am of opinion, that the landlord must have the double rent.

Per † *Cur.*—Let the DEFENDANT have the *possession*,
in order to enter up his judgment.

† Mr. J. Denison and Mr. J. Yates were both of them absent.

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Peart and Another *versus* Westgarth and Another.

Order of sessions
for appointing
overseers for the
divisions of a
large parish,
able to reap the
benefit of 43
Eliz. a nullity.

UPON shewing cause against a MANDAMUS "To appoint
" *four* overseers for the whole parish of Stanhope in the
" county palatine of *Durham*," the question was, whether
the several districts within it were one *entire* parish township
and village, within the intent and meaning of the several sta-
tutes made for the relief of the poor; and for that purpose
have had and of right ought to have one *joint* appointment of
overseers of the poor, for the *joint* relief and maintenance of
the poor in and throughout the parish: or, whether the said
several districts, being divided into six separate constableries,
constituted four *distinct and separate* townships or villages,
within the intent and meaning of 13, 14 Car. 2. c. 12.
§ 21.

It was, by consent of the parties, tried upon a feigned is-
sue at the last assizes at *Durham*: and a verdict was found
for the plaintiffs (with 1 s. damages and 40s. costs) subject
to the opinion of this court upon the following case.

Case—That from 43 Eliz. to 9 G. 1. (1723) the parish of
Stanhope had one *joint appointment* of overseers of the poor of
the said parish; and during all that time, the poor of the said
parish were *jointly relieved and maintained* by *entire and general*
rates upon the *whole* parish.

During the time abovementioned, there were 4 church-
wardens, and 4 overseers of the poor; which 4 *overseers*
were respectively nominated out of each of the four quarters
or districts within the said parish called *Forest* quarter, *New-*
landside quarter, *Park* quarter, and *Stanhope* quarter; viz.
one out of each of these quarters: and in each quarter, there
was one church-warden and one of the said overseers who
collected the poors rates in the quarter or district wherein
they respectively resided; but the money collected by the se-
veral church-wardens and overseers was levied under *one en-*
tire assessment upon the *whole* parish, and carried to one *general*
fund, and was applied to the *joint* relief of all the poor of the
said parish.

The parish is 20 miles in length, from East to West; and
8 miles, at a medium, in breadth. The *Park* quarter is one
distinct constabulary; the *Forest* quarter, one; and the *Stanhope*
quarter, one: and the *Newlandside* quarter consists of 3 *con-*
stableries; but these three constableries compose and are con-
sidered as one quarter only.

ON

ON 17th. July, 9 G. 1. at the general QUARTER SESSIONS holden at the city of *Durham*, in and for the county of *Durham*, it was ordered, "That the several townships or constabularies of *Stanhope*, *Fosterley*, *Newlandside*, *Eastgate* and *Westgate* should separately maintain their own proper poor."

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and Another.

This order of sessions was thus prefaced—"Forasmuch as this court has been moved by and on the behalf of the township of *Stanhope*, and also of the several townships and constabularies of *FOSTERLEY*, *Newlandside*, *Eastgate* and *Westgate* within the parish of *Stanhope*, that each and every of them should and might maintain their respective and proper poor distinctly and separately from each other and from any other part of the parish of *Stanhope*; but the said motion being opposed by the constabulary of *FORREST* quarter within the said parish of *Stanhope*, but not by any other part of the said parish;" now, after hearing counsel, it is ordered, [*ut supra* :] unless cause be shewn to the contrary by the constabulary of *FORREST* quarter at the next sessions.

FROM that time there have been *separate appointments* of overseers of the poor for each of the said *four quarters or districts*; and each of the said quarters maintained their own poor *separately*; excepting that about 12 years ago, two townships or constabularies called *Bishopley* and *Fosterley*, within *Newlandside* quarter, separated themselves from the rest of that quarter, and have ever since had separate overseers, and maintained their own poor separately.

The case further stated, that orders of *removal* had from time to time been made since the year 1729 to the year 1761 (exclusive of each of those years) for the removal of poor persons *from one* of the said quarters or districts *to another*; and *appeals* made by one quarter against another, concerning orders of justices relating to the poor of each.

The question was *general*—"Whether the plaintiffs were intitled to recover." But the particular question debated, was—whether the several places or districts were *one entire* parish township or village; or, whether the said several places, being divided into six separate constabularies, constituted *four distinct and separate* townships or villages within the 13, 14 C. 2. c. 12.

This case was first argued on *Tuesday 20th. November* last, by Mr. *Walker*, for the plaintiffs; and Mr. *Dawson*, for the defendants.

Mr.

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Another v.
WESTGARTH
and Another.

Mr. *Walker* argued against the division of this parish into separate townships.

He stated the 21st section of 13, 14 C. 2. c. 12. which directs, that in the counties of *Durham*, &c. where, by reason of the largeness of the parishes, they cannot reap the benefit of the act of 43 *Eliz.* c. 2. the poor within every township or village shall be maintained and set on work within the respective township and village; and there shall be yearly chosen, according to 43 *Eliz.* c. 2. two or more overseers of the poor within every of the said townships or villages, who shall execute all the powers for relief of the poor within the said township or village, as the said act directs.

And he insisted, that in order to intitle themselves to a division, it must be *shewn*, "That the parish was so large, that they could not otherwise have the benefit of the 43 *Eliz.* c. 2." To prove this he cited *Rex v. Justices of Middlesex*, relating to the inhabitants of *St. Pancras and Kentish Town*, Tr. 1754. B. R. And he mentioned a case of *East and West Bradfield* near *Sheffield*, in *Yorkshire*: and he said, that in *Wolfsingham* parish, (the next parish to this, and under the same circumstances of seven constaberies,) a division was made by consent; not by an order of sessions.

It does not appear that this parish cannot have the benefit of 43 *Eliz.* c. 2. The contrary rather appears.

There are no facts to warrant this division; nor can it be supported under the 13, 14 C. 2. The sessions had no power to make it. Neither the sessions nor the court have power to make a division, but upon facts which shew the parish to be so large that it cannot have the benefit of the 43d. of *Eliz.* It shall be presumed "That that act may be put in force"; unless the contrary appears.

He added, that it comes out, upon experience, that parishes are too small, rather than too large; and that the legislature should rather, upon principle, collect several into one, than divide one into several parts.

Mr. *Dawson*, *contra*, argued for the division; premising that the present point has never been judicially determined.

The question depends upon 13, 14 C. 2. c. 12. § 21, 22. and 43 *Eliz.* c. 2.

The

The plaintiffs ought not to recover: because, 1st. The parish is so large as to be *within* these statutes; and 2^{dly}. The sessions *had* a power to make this division.

First—Though it is stated “That this parish was one entire parish from 43 *Eliz.* till 9 *G. 1.*” yet it is also stated, that there were 4 church-wardens and 4 overseers; one out of *each* quarter. Indeed it is *not expressly* stated, “That it is “a populous parish.” But this sufficiently appears by the *circumstances*: and it appears that it was so, at the *time* of making the act of 43 *Eliz.*

The present order of sessions was made 9 *G. 1.* for the separate divisions of this parish to maintain their own poor, *unless* cause was shewn by the constabulary of Forrest quarter at the then next sessions. No cause was shewn: and they have acquiesced under that order, ever since; and have, now, maintained their own poor *separately* for 40 years.

As to the cases mentioned on the other side—*Rex v. The Justices of Middlesex*, relating to the inhabitants of *St. Pancras*, was for a *mandamus* to appoint overseers for the North division of *Kentish Town*; but the *mandamus* was denied; because it appeared “That the parish *could* reap the benefit of “the 43 *Eliz.*” And it did not appear, that the North division of *Kentish Town* was a township or vill. As to *Bradfield* case—No order of sessions was made there, or any thing done to support a division. And, as to the *Wolfsingham* case—It was given up without argument.

Therefore, there has been no judicial determination at all, as far as appears, upon this matter.

THE COURT, upon this first argument, thought the justices had no power to *divide* parishes, (to fitter parishes into pieces, as Mr. Justice WILMOT expressed himself:) and Lord MANSFIELD said he believed that the point of *policy* was as Mr. Walker said; namely, “That parishes should rather “be larger than smaller than they are.” It was ordered to stand for further argument.

Ulterius concilium.

It was now argued again, by Mr. Wedderburne, for the plaintiffs; and Mr. Clayton, for the defendants.

Mr.

1765.

Pratt and
Another v.
Westgarth
and Another.

1765.

PEARCE and
Another v.
WESTGARTH
and Another.

Mr. *Wedderburne* enforced the arguments which had been urged by Mr. *Walker*; and observed that all along from 43 *Eliz.* to 9 *G. 1.* the parish had only one *joint* appointment for the *whole* parish: so that it was manifest, not only that they *could*, but that they actually *had* for many years reaped the benefit of 43 *Eliz.* And *no authority* for this division appears in the case. The quarter-sessions had no power to make it. The truth is, that the rich part of the parish want to separate themselves from the poor part, and throw the burthen upon them.

Mr. *Clayton*, *contra*, enforced Mr. *Dawson's* arguments; and particularly that of the division having been acquiesced under for above 40 years; and the annual appointments of overseers by two justices having been accordingly, ever since the year 1723.

Lord MANSFIELD said he had no doubt, upon the first argument.

The policy of this law of 13, 14 *C. 2.* was mistaken: it went upon a *wrong* principle. The divisions ought rather to be enlarged, than diminished.

As to the question itself—Consider, 1st. What was done; 2dly. Upon what foundation?

It ought to appear “That there was an *INABILITY* in the parish, to have the benefit of the act of 43 *Eliz.*” Now here, *no* such inability appears; but quite the contrary, for a great number of years: so that there is *no foundation* for the division.

The *acquiescence* under it was upon a false notion, “That the sessions *had* such a power:” which they had *not*. And there is no inconvenience in setting right this wrong usage which has obtained for 40 years.

In the case of *Kentish Town*, all the judges held, “That the foundation of such a division of a parish must be an inability of having the benefit of 43 *Eliz.*”

Here, the foundation is wanting. Therefore judgment must be for the plaintiffs.

Mr. Justice WILMOT also thought, that the larger the circle, the better: therefore it would be more proper to enlarge than to lessen the divisions.

The

The statute of 13, 14 C. 2. goes upon this *basis*, "That the parish is so large as that it can *not* have the benefit of the 43 Eliz." This, therefore, is a fact that ought to be quite *clear* and *certain*. Whereas on the contrary, it appears in the present case, "That this parish actually *had* that benefit from 1602 to 1723; above 120 years."

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and Another.

The sessions do not seem to have had any sort of power to make such an order; therefore their order is a mere nullity. It was not made upon any appeal; but upon a motion made on behalf of some of the quarters, and opposed by another.

The *subsequent* usage for 40 years cannot vary the right. For, we can not *presume*, "That omnia rite acta sunt;" because we see that it was founded upon this order of sessions: and it does not appear that the parish is so large that it can *not* have the benefit of 43 Eliz.

Therefore they ought to appoint running overseers over the *whole* parish.

Per * Cur.

JUDGMENT for the PLAINTIFFS.

* Mr. Justice
Denison and
Mr. Justice
Yates were,
both of them
absent.

Rex *versus* Sir William Trelawney, Steward
and Capital Burgefs of West Loe.

Tuesday, 29
Jan. 1765.

A Motion had been made for an information in nature of *quo warranto* against him, for acting as capital burgefs, having been steward (a *higher* office, as was alledged,) *when* elected capital burgefs; which higher office of steward was said to be *incompatible with*, and therefore rendered him *incapable* of being elected into the *lower* office of capital burgefs.

Information in
nature of *quo*
warranto,
against the
steward of a cor-
poration for
acting as a ca-
pital burgefs,
refused.

On shewing cause now, it was (*inter alia*) alledged, that they were *not* incompatible: but if they were incompatible, it would be the *former* office that was vacated by the acceptance of the *latter*; and *not* the office which was *last* accepted.

Lord MANSFIELD went through the particular circumstances of the present case; and observed how insufficient the whole amount of them was. Here is no fact doubted; no opposition; no objection ever made. All the evidence that

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that can be traced shews a consistent usage for 100 years back, "That the steward, if a capital burghess before, has *remained* a capital burghess." And in point of law, there is no incompatibility in the steward being a capital burghess. If he should be chosen mayor, it may then be a question "Whether his acceptance of *that* office does not vacate his "office of steward." It seems to me very strong, (though it is not now necessary to determine it,) that *if* these two offices of *steward* and capital burghess were incompatible, the acceptance of the latter would imply a *surrender* of the former.

Mr. Justice WILMOT had no doubt. Here is no question, either of law or fact. The fact is agreed "That, *being* steward, he was chosen capital burghess." And as to the law—there is no incompatibility, in *this* case.

• c. 18.
§ c. 20.

The two acts of parliament (of 4, 5 *W. & M.* and 9 *Ann.*) relate to quite different objects; and are the reverse of each other. The former *restrains* the clerk of the crown in this court from exhibiting or filing informations *without leave* of the court in cases where all the king's subjects might, before the making of that act, have made use of his name *without* such leave. The latter *lets in every body* who desires it, to make use of his name in prosecuting usurpers of franchises; whereas, before, *no subject* could have done so: but it provides, that *these* informations (as well as those for misdemeanors) must be under the leave and discretion of the court. Therefore the court ought not to give such leave without sufficient reason.

He then entered into the circumstances of the case: upon which, he made (amongst others) the following remarks. Here appears to have been an usage for a whole century, "That both offices have actually been in the same person." The legality of this was never questioned, before: and it has been several years acquiesced in. The charter does not imply any incompatibility. The steward does not seem to be a part of this corporation.

• Mr. Justice
Denison and
Mr. Justice
Yates were
absent.

*Per * Cur.* clearly and unanimously,

RULE DISCHARGED.

Rex

Rex *versus* Grainger.

1765.

Tuesday, 29

Jan. 1765.

ON Tuesday 27th. November 1765, Mr. Wallace moved to set aside the defendant's plea to an indictment; and that judgment might be entered against him by default; as the prosecutor had, by reason of this *dilatory* plea, lost the benefit of trial at the sittings after term.

Dilatory plea to indictment, set aside for want of affidavit to verify it.

His objection was, "That the plea is a dilatory one; and yet is *not verified by affidavit*; nor is any probable matter shewn to the court, to induce them to believe that the fact of it is true."

The plea was of Michaelmas term 1765; and is in these words—"And the said John Grainger, who in and by the said indictment is called by the name and addition of John Grainger late of the parish of Kensington in the county of Middlesex, butcher, in his own person cometh; and having heard the indictment, he saith that at the time of taking the said indictment and long before, he the said John was, and ever since hath been, and still is inhabiting resident and commorant in the parish of St. James, Westminster, in the county of Middlesex aforesaid; WITHOUT this, that he the said John now is, or at the taking of the said indictment, or at any time before, was inhabiting resident or commorant at the parish of Kensington in the county of Middlesex: and this he is ready to verify. For which reason, and because he the said John Grainger is not called, in the said indictment, John Grainger late of the parish of St. James, Westminster; he the said John prays judgment of the said indictment, and that the same be quashed."

Mr. Wallace relied on 4, 5 Ann. c. 16. § 11. which says "That no dilatory plea shall be received in any court of record, unless the party offering such plea, do, by affidavit, prove the truth thereof; or shew some probable matter to the court, to induce them to believe that the fact of such dilatory plea is true."

RULE to shew Cause.

Mr. Ashurst now shewed cause, on behalf of the defendant; and cited the 7th. section of the abovementioned statute; and Mr. Justice Foster's book, p. 16. Charles Kinloch's case; where there was no affidavit.

Lord

1618

Hilary Term 5 Geo. 3. B. R.

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REX V.
GRAINGER!

Lord MANSFIELD—That was at the bar: 'tis not like the present case; nor does the 7th. section of the act extend to this 11th. It is usual to annex affidavits to pleas of this sort, in the crown-office: and I do not see why they should not be annexed.

RULE MADE ABSOLUTE, to set aside

the plea, * for want of an affidavit

* N. B. They did not at all enter into the merits of the plea.

(1 Black. Rep.
535. S. C.)

Friday, 1
Feb. 1765.

Circumstances
may support the
interpretation of
a devise to be in
fee, which on
the face of it, is
only for life.

Frogmorton, ex dimiss' Bramstone, versus
Holyday et al.

THIS was a special case, upon an action of trespass and
ejectment, from the last assizes for the town and coun-
ty of the town of *Kingston upon Hull*.

Margaret Hasselwood, being seised in fee of the premises in
question, by her will dated 28 October 1719, amongst other
things, devised as follows—"As for my worldly affairs and
estate &c—I do dispose thereof in manner following. Im-
primis, I give devise and bequeath unto my son *David*
Hasselwood and his heirs for ever, my malt-kiln standing and
being in *Black Friar Gate*—item, I give devise and be-
queath unto my son *John Hasselwood*, all that house and
garden now in the tenure and occupation of *Edward Gibson*,
mariner; charged and chargeable, nevertheless, with the
payment of the sum of 50 l. of lawful British money: which
said sum of 50 l. I give devise and bequeath unto my
daughter *Margaret Holyday*, payable and to be paid to her
out of the yearly rents issues and profits of the said house; to
be paid unto and received by my said daughter *Margaret*
Holyday yearly and every year, until the said sum of 50 l. be
fully paid and satisfied. And if the said *John Hasselwood*
shall happen to die in his minority or before he comes to
age, then I give devise and bequeath the said house and
garden unto my 3 daughters *Elizabeth Locking*, *Margaret*
Holyday, and *Hannah Hasselwood*, equally, share and share
alike." Then she gives small specific personal legacies, of
money, silver salvers &c; and concludes thus—"All the
rest and residue of my goods chattels rights and credits (not
mentioning her real estate) I give devise and bequeath unto
Mr. G. H. and E. L."

The testatrix soon afterwards died; leaving issue *David*
her eldest son, and *John* her youngest son, and the three
daughters abovementioned.

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5 J. Rep. 14

At the time of making and executing the said will, her son *David* was of the age of 23 years; and her son *John*, of the age of seven years. The premises in question, which were devised to *John*, were then of the yearly value of 10 l.

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ex dimiss.
BRAMSTONE,
HOLYDAY
et al.

The said *John* entered upon and was seised of the same until the time of his death; which happened in 1762.

In the life time of *John*, the abovenamed *David*, (the eldest son and heir at law of the said *Margaret*;) died intestate, leaving issue *David* his eldest son; who, by deed of bargain and sale inrolled, dated 20 Sept. 1758, conveyed the premises in question to *Stephen Bramstone* (the lessor of the plaintiff) in fee-simple.

The maltkiln devised to *David* was, at the time he took possession of it, let at 10 l. a year, and has been since sold for 220 l. being the value thereof.

David was set up in the business of a grocer and tallow-chandler, by *David Hasselwood* his father; who advanced to him, at different times, upwards of 500 l. and also gave him a messuage and shop and staith, of the yearly value of 20 l. and another messuage and garden of the yearly value of 12 l. and by his will, dated 16 July 1716, devised to the said *David* his eldest son ten shillings, in full of all he might claim out of his estate, having provided for him in his lifetime. And the said *David Hasselwood* the father did, by his said will, devise to *Margaret* his widow, (the present testatrix) a freehold estate at *Gottingham* in the county of *York* for life; and after her decease, to the before mentioned *John* his son in fee: which estate, at that time, was of the yearly value of 40 l. and he devised other estates to his said wife; some for life, and others in fee, and directed his said wife to bring up and educate all his said children, and find and provide them all manner of necessaries at her own charge, during their respective minorities.

Upon the trial of this cause, a verdict was found for the plaintiff; subject to the opinion of this court, upon the following

Question—"Whether an estate for life, or in fee, in the premises in question, passed to the abovenamed *John Hasselwood* by the said will of *Margaret* his mother."

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FROGMORTON
ex dimiss.
BRAMSTONEV.
HOLYDAY
et al.

It was first argued on Tuesday 20 November last, by Mr. Wallace for the plaintiff, and Mr. Hotham for the defendant; and again now, by Mr. Blackstone for the plaintiff, and Mr. Wedderburne for the defendant.

THE COUNSEL for the plaintiff insisted that John the second son took an estate for life only.

The words, in legal strictness, import an estate for life: and no intention appears to the contrary. The intention must be collected out of the words. *Cro. Car.* 368. *Spirit v. Bence.*

Collier's case, 6 Co. 16. a. proves, "That a charge of so much *per annum* does not give a fee." And the reason is, because the devisee may pay it out of the profits. 'Tis true, wherever the devisee may suffer, it makes a fee. But here, the devisee could not be a loser: for the charge is not upon him, but upon the estate and is payable out of the profits. Now this estate being 10 l. *per annum*, a charge of 50 l. would have been discharged in about 5 years: consequently, here is no possibility of a loss. Therefore the case of *Read v. Hatton* in 2 Mod. 25. was not, they said, against them: for, there was a possibility of loss. And there is no case substantively determined on an introductory clause only.

No inference can be drawn from the contingency of John's dying under 21: for in that event, the three daughters were to take; who were not his heirs at law. So that it is not at all similar to the case of *Purefoy v. Rogers*, nor affected by the note at the end of that case, in 2 Saunders 388. That note itself is only the opinion of the reporter. There the devise was—"I give my inheritances &c: and if he die before he come to the age of 21, then I give my inheritances &c, to my heirs for ever." There, the substitution was "To the testator's own right heirs;" who would have taken without that clause: but here, the substitution is to third persons. Therefore John had a life-estate only. And so it appears, by *Comyns* 353. *Fowler v. Blackwell et al.* in C. B.

The testatrix might, with good reason, give a fee to the eldest son, of 23 years old; and only a life-estate to her younger son, of 7 years old: the savings during his infancy might make this devise equal to his brother's. This is a devise "To John" in general, without adding any particular limitation: and there is no reason to suppose it to be intended any more than for his life.

THE

THE COUNSEL for the defendant argued this to be a fee in *John*, by the apparent intention of the testatrix.

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FROGMORTON
ex dimiss.
BRAMSTONE v.
HOLYDAY
et al.

Any charge of a gross sum gives a fee: so does every annual payment. So is *Moore* 853. And this is a charge of a greater value, than can probably leave any benefit to the devisee.

Collier's case only proves, that where it is payable out of the profits, it is only a life-estate. But this is a charge of a great proportionable value. The devisee can receive nothing during 5 years at least, whilst the 50 l. is paying off: and there is a strong improbability of his being at all a gainer by the devise. Therefore it must be construed a fee. It is a principle, "That the devisee must be meant to be benefitted." It is not enough, "That he probably can be no loser." *Read v. Hatton*, 2 Mod. 25, 26. was cited, as a proof of this; and as shewing that the benefit to the devisee is the spirit of the rule. But there was an event in which he must have been a loser; namely, that of his mother's living till he came of age, and then his own death happening before he could have received 50 l. out of the profits.

Here was a mother of several children, without partiality to any of them. She gives a fee to the first; and certainly intended the same benefit to the second son.

The devise over to her 3 daughters,—“If *John* dies before 21”—is an argument of the intention of the testatrix. Why should this clause of restriction to dying under 21 be added, if she meant only a life-estate? And if he had died before the end of the 5 years her daughter *Margaret Holiday* would not have reaped the fruit of the 50 l. legacy; though her mother certainly meant that she should. In this respect, it is within the reason of the case of *Baddeley v. Leppingwell* * in * *V. ante*, *Trinity term last*; where if *Sarah Boreham* had not taken an estate in fee, the annuity to her sister might have failed. p. 1542, 1543.

The testatrix professes to dispose of all her worldly estate; and considers the residue as consisting of personal estate ONLY. These words “All her worldly estate” shew her intention to dispose of the inheritance. *Ibbetson v. Beckwith, Forrester* 157, 160. In *Comyns* 337. *Scot v. Alberry*—a devise “To my cousin *Thomas Scrape*, of all my lands in *Waltham-Abbey*, “with all other my estate whatsoever and wheresoever,”—was holden to comprehend “All that he had, real or personal.”

1765.

FROGMORTON
ex dimitt.
FRAMSTONE V.
HOLYDAY
et al.

And there is no case negatively determined, "That this" expressing the payment to be out of the rents and profits, "does not admit of its being the testator's intention to give" "an estate in fee." The court must judge upon the circumstances: and the circumstances of *this* case shew, that a fee was intended.

THE COUNSEL for the plaintiff replied, that here is a very considerable *chance* of a benefit: and no possibility of loss. It is not necessary, that it should be a *certain* benefit: a probable chance of benefit is sufficient.

In the case of *Read v. Hatton*, there was a possibility of loss: and the annuity to the devisee's sisters was for life.

As to *Scott v. Alberry*—It does not apply to the present case; because the words there are so very strong—"All my" "estate whatsoever and wheresoever."

As to the charge of 50 *l.*—It is settled, that if the charge is payable *out of* the rents and profits, it does *not* give a fee. The present case is a valuable and beneficial devise, upon the *balance* of the rents and the charge: and therefore it shall not be construed to carry a fee.

As to the devise over to the three daughters, in case of *John's* dying before 21—if this clause had not been added, it would, in that case, have gone to the elder brother (*John's* heir at law:) whereas the testatrix meant it for *other* persons, and *not* for the heir at law; and therefore *this* foundation of her intention to give a fee to *John*, entirely fails. And no intendment can be drawn, but from the words of the will.

LORD MANSFIELD—The testator's intention must be taken and collected from the *whole* will: and it must prevail, if consistent with law.* *Coryton v. Hellier* was a construction taken from *all* the parts of the will considered together, to imply the usual qualification "*If he live so long*," after the limitation of a term for 99 years; which had been omitted by the negligence and inaccuracy of the writer, contrary to the manifest intent.

The question is, "Whether *John Hasselwood* took an estate "for *life*, or in *fee*, under this will."

There are *no* words of *limitation* added to the devise to him. Many people do not know that words of limitation are necessary to be added to devises of land, any more than to bequests

* 30th. Aug.
1745, before
Lord Hard-
wicke, in Chan-
cery.

bequests of personal estate. If nothing else appears, the devise must be construed according to law; and the devisee, without words of limitation, can take an estate for life only.

Here are many other clauses in this will, from which, taken all together, the intention of the testatrix may be collected.

1765.

FRUGMORTON
ex admist.
BRAMSTONE V.
HOLYDAY
et al.

She has declared, that she did not mean to die intestate, as to any part of her real estate. She has specifically named each part of it: and her sweeping residuary clause does not mention her real estate. Therefore she thought she had fully disposed of that before: and consequently, she meant this devise to her son John to be a devise in fee. Then she charges this devise with 50 l. Let the sum charged upon a devise be ever so small, it shall give a fee: but if it be made payable out of the annual profits, 'tis otherwise. This therefore is a middle case. For, here, John was but seven years old; and she appoints him guardians during his minority: therefore he did not want the whole profits. "If he should die under 21," there is a devise over to the three daughters of the testatrix. This shews her intention to give a fee. For if he lived to 21, he might then dispose of it himself: if he died before, he could not; and then she disposes of it.

If John was barely to take an estate for life, the time of his death must be immaterial to the devise over. But limiting it over, only upon the contingency of his dying in his minority shews that she intended to give him an absolute estate in fee, which he might dispose of if he came of age: and unless he lived to be of age (when he might dispose of it,) she meant it should go to her daughters.

A question applicable to this part of the argument was pleaded in the days of ancient Rome, by * Scævola and Crassus, * Tully de Oratore, lib. in the famous cause between Curius and Coponius; and much agitated in modern times, in the courts of Westminster-Hall, 1. fo. 175. in the case of Jones and Westcombe.

A man, taking for granted that his wife was with child, devised his estate to the child his wife was enseint of: and if such child died under age, then he devised it over. The woman was not with child. The question was, "Whether the devisee over should take."

1765:

FROGMORTON
 ex dem
 BRAMSTONE v.
 HOLYDAY
 et al.

* Oratio pro
 Cæcina.

h p. 316
 i p. 249
 k p. 94

The * *Roman* tribunals, at once, and the *English*, at last, † finally determined, that the intent, though not expressed, must be construed to give the estate to the substitute, *unless* a posthumous child lived to be of age to dispose of it. Consequently, no posthumous child having ever existed, the substitute was intitled.

† In *Jones v. Westcomb*, it came before Lord Harcourt upon a bill for an account of the personal estate. And there were several questions; particularly, “Whether the surplus was disposed of, or not.” The case is reported in *Precedents in Chancery*, in *Equity Cases Abridged*, and *Reports in Equity*, called *Gilbert's*. The deeds and writings, as to the *real* estate, were ordered to be brought into court.

In *Trinity* term 1738, the case came on, for the opinion of the court of *king's bench*, upon an ejectment brought for the *leasehold* estate: and then the court gave judgment for the wife, to whom one-third was devised over.

An ejectment was afterwards brought in the *common pleas*, by the representatives of the wife, and two sisters, devisees, for the *freehold* estate. It came on to trial before Lord Chief Justice Eyre; and a case was made—this case was several times argued in the *common pleas*. The 13th, of *February* 1741, the opinion of the court was “That the devise over never took effect.” Judgment for the plaintiffs, for two-thirds only.

Afterwards, another ejectment was brought for the *freehold*, in the *king's bench*: and the judgment of the court was for the devise over. The first case was *Jones v. Westcomb*; the second, *Andrews* on the demise of *Jones v. Fulham* and others; the third, *Roe*, on the demise of *Fulham v. Weket*; the fourth, *Gulliver*, on the demise of *Fulham, v. Weket*, in the *king's bench*, *Mich.* 10 G. 2. And Lord Chief Justice Lee, in delivering the opinion of the court, mentioned, as one reason of their opinion, “That the intent of the testator was apparent and express that the estate should not descend;” “and that the contingency was not a condition precedent;” “but a limitation preceding the estate to the wife.”

The argument holds equally, from a limitation over, “If the first taker dies in his minority,” to infer that he was intended to have the absolute property if he attained his majority.

This

This is a family provision for all her children; without hampering them with intails and limitations. There could be no intention to make a difference between the two sons.

1765.

FROGMORTON
ex dimitt.
BRAMSTONER.
HOLYDAY
et al.

Therefore sufficient appears upon the face of the will, to shew that the intention of the maker of it was, "That *John* should have the estate, UNLESS he should die in his minority."

Mr Justice WILMOT—Here is such an intention clearly manifested by the will. The statute only requires a will in writing; but requires no technical words. Therefore if by *sound* (not indeed arbitrary) construction, it appears that the intention was "To devise a fee," it is immaterial what words are made use of. And all the circumstances and clauses are to be united and taken together, in order to collect this intention.

Now upon this will, the intention does sufficiently appear. The introductory clause is very material. It shews the object of her consideration to be her *whole wordly estate*: and it is much the same as if it was repeated in *each* clause.

She had two sons and three daughters, she meant to provide for them all. She meant to give the same value and the same interest to both of her sons; only that *John's* part should be subject to the 50*l.* charge: and in case of his death in his minority, she gives his part to her daughters. If she had intended it to have gone, in that event, to her son *David*, such a devise over "to *him*," would have been unnecessary and idle; a devise "to an heir at law" being nugatory.

As to the charge upon this devise to *John*—Though it is made payable "OUT of the rents and profits," yet it is accompanied with such *other clauses*, as take it out of the distinction laid down in *Collier's* case, in 6 Co.

If the testatrix had lived till *John* had come of age, and then died; and *John* had also died within 5 years after his mother's death; this devise would have been *no benefit* to him, but possibly the *contrary*. Therefore she, probably, did *not mean* it to him for life only; when it might have been disadvantageous to him, if his interest in it had ceased with his life.

He concurred with Lord *Mansfield's* manner of reasoning upon the residuary clause; wherein she has made no mention of her real estate; having fully disposed of it before.

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FROGMORTON
ex dimiss.
BRAMSTONE V.
HOLYDAY
et al.

Mr. J. Denison
and Mr. J.
Yates were ab-
sent.

The only circumstance that could prevent his enjoyment of the estate so as to have the disposal of it himself, was the contingency of his dying under 21. For, upon the whole, it appears that she meant to give him an estate of inheritance.

*Per * Cur.* unanimously,

The PLAINTIFF to be nonsuited: and—

The *Posse* to be delivered to the DEFENDANT.

Chapman, *ex dimiss.* Oliver et al. *versus* Brown et al.

In order to ef-
fectuate the ge-
neral intention
of testator, court
construed *son* as
a word of limi-
tation.

THIS was a special verdict, upon an ejectment, brought by *Cornelius Chapman*, on the several demises of *Richard Oliver* and *Isabella* his wife (the testator's heir at law;) and of *Thomas Battersbee* and *John Cooke*, two trustees; found at the Lent assizes 1763 for the county of *Lancaster*. It was found on the demise made by *Oliver* and his wife: and was to the effect following.

Joshua Brown, being seised in fee of the premises in question, by his last will dated 4th of *May* 1694, devised the same to his wife for life; and after her death, to his brother *Thomas Brown*, until such time as *William* the eldest son of his brother *Reginald Brown* should attain the age of 24; and from and after the said *William's* attaining that age he gave the same to his said nephew *William Brown* and his assigns for and during the term of his natural life; and from and after his death, then to the first son of the body of the said *William Brown*, lawfully begotten or to be begotten, and to the heirs male of the body of such first son lawfully to be begotten; and for want of such issue, then to the 2d. 3d. 4th. 5th. and every other son and sons of the said *William*, according to their seniority, and to the heirs male of their bodies, the eldest of the said sons of the said *William Brown*, and the heirs male of his body, always to be preferred before the younger and his heirs male; and for want of such issue of the body of the said *William Brown*, then to the SECOND son of his said brother *Reginald Brown*, for and during the term of his natural life; and after the death of the said second son of his said brother *Reginald Brown*, then to the first son of the body of such SECOND son, of his said brother *Reginald Brown*, lawfully begotten or to be begotten, and to the heirs males of the body of such SECOND son, lawfully to be begotten; and for default of such issue, to the 3d. 4th. 5th. and every other son or sons of the said second son of the said *Reginald*, (according

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(according to their seniority) and to the heirs male of the bodies of the said third, fourth, fifth and other sons of the said second son of the said *Reginald*, lawfully to be begotten, the eldest of the said son and sons and their several heirs male according to the seniority and priority of birth to be preferred before the younger of the said sons and their heirs male; and for want of such issue, then to the eldest or next son or sons of the said *Reginald Brown* for the time being, for the term of his natural life; and after his or their deaths, to the heirs male of the body of such eldest and next son of his brother *Reginald*; and for want of such issue, then to the first son of his brother *Samuel Brown*, for and during the term of his natural life; and from and after the death of such first son of his brother *Samuel Brown*, then to the first son of the body of such first son of the said *Samuel Brown*, lawfully begotten or to be begotten, and to the heirs male of the body of such first son of the said *Samuel Brown* lawfully to be begotten; and for want of such issue, then to the 2d. 3d. 4th. 5th. and every other sons of the eldest son of *Samuel* in tail male, and for want of such issue, then to the 2d. 3d. 4th. 5th. and each other son and sons of *Samuel* for their respective lives; and after their respective deaths, to their respective sons, in tail-male; and for want of such issue, then to his own right heirs for ever. Then comes this article, "And I do declare that the reason of my settling and limiting my said messuages lands and hereditaments as aforesaid, is because I desire to have the same continue in my name and blood, so long as it should please God to permit the same."

On the 1st of August 1694, *Joshua Brown* the testator died seised of the premises, without any issue; leaving *Ann* his widow; his 3 brothers, *Thomas*, *Reginald*, and *Samuel*; and his nephew *William Brown*, the only son of the said *Reginald* at the time of the testator's death and also at the time of making his will, and who was born on 29th March 1682.

Upon the testator's death, *Ann* the widow entered; and so did *Thomas* his brother; (on their respective parts devised to them); and on 29th March 1706, the nephew *William* having attained his age of 24 years, he also entered upon the tenements devised to him.

After the death of *Joshua* the testator, but during the life of *William* his nephew, *Reginald* the testator's brother had issue a second son, namely *THOMAS BROWN*; who was born 13th of March 1695: and on 16th of January 1696, *Reginald* died, leaving issue the said *William* and *Thomas*, and had no other sons.

On

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On 12th of *January* 1712, *Ann* the widow died; and *William*, the first son of *Reginald*, entered upon the premises; and died seised thereof, on 20th of *December* 1722; leaving issue *ISABELLA*, now the wife of *Richard Oliver* the plaintiff. Upon his death, *THOMAS* his brother (the 2d. son of *Reginald*) entered; and in 1727, 1 G. 2. obtained an act of parliament to enable him to grant building-leases of the premises in question; having then a son named *Reginald*, and a daughter, both under age: this *Reginald* was born 4th *October* 1718, and was the only issue male of *Thomas*; and died 26th *April* 1736, without issue and unmarried, and under the age of 21.

In 1747, a common recovery was suffered of the premises, by *Thomas Brown*, who was the vouchee: which, by indentures of bargain and sale and of release, dated the 1st and 2d of *April* in the same year, was declared and agreed by all the parties to the said indenture to be and enure to the use and behoof of the said *Thomas Brown* his heirs and assigns for ever, and to or for no other use intent or purpose whatsoever.

Thomas Brown, being so seised, on 5th of *June* 1762, made his will, whereby he devised the premises in question (after the death of *Margaret* his wife and *Sarah Barlow* [now *Mason*] his daughter,) to his grandson *John Barlow* his heirs and assigns for ever; and on the 7th of *November* in the same year, died; leaving the defendant *Sarah Mason*, the wife of the defendant *Jesson Mason*, his daughter and heir at law.

Thomas and *Samuel Brown*, the brothers of *Josbua* the original testator, died without any issue.

ISABELLA OLIVER, the plaintiff, is heir at law of *WILLIAM BROWN*, the first son of *Reginald Brown*; and is also heir at law of *Josbua Brown*, the original testator.

The defendant, *Sarah Mason*, is heir at law of *Thomas Brown*, the second son of the said *Reginald*.

The following PEDIGREE will give a clearer conception about the parties.

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JOSEPH BROWN,
the testator, died
on 1st Aug. 1694;
leaving three bro-
thers and one ne-
phew (William.)

REGINALD
died 16th Jan.
1695; and left
issue

THOMAS
died on 19th Jan.
1714. S. P.

SAMUEL
died without issue.
S. P.

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WILLIAM BROWN
born 29th March 1681;
died 20th Decem. 1722.
He left
only one daughter

THOMAS BROWN
born 13th March 1695;
died 7th Novem. 1762.
He made a will;
and had issue

ISABELLA,
the wife of
Richard Oliver,
lessor of the
plaintiff.

REGINALD,
born 4th Oct. 1718;
died 19th Apr. 1736.
S. P.

SARAH
wife of Jesson Mason,
now living; one of the
defendants.

THE QUESTION was, "Whether THOMAS, the second son of Reginald, (which Thomas was not born till after the death of the testator Joseph Brown,) took an estate tail under Joseph Brown's will, or only an estate for life."

On the part of the plaintiff, it was insisted to be an estate for life only: on the part of the defendants an estate tail.

Mr. Wadderburne argued for the former; Mr. Wallace for the latter.

The substance of the arguments on either side amounted to the general effect following.

THE PLAINTIFF'S counsel argued, from the whole scope of the will, and particularly from the testator's express declaration, "That the reason of his settling and limiting his estate in the manner he had done, was because he desired to have the same continue in his name and blood," and likewise from the express words, "For and during the term of his natural life." That the manifest INTENTION of the testator Joseph Brown was to give to the second son of his brother Reginald an estate for life only; and to make all the sons (either born or unborn) of his brother Reginald, and of his brother Samuel (after his brother Reginald,) tenants for life successively; with remainders in tail, to the first and every other sons of such respective tenants for life.

An

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An estate for life may be limited to a person unborn, as the first taker. And here, the estate first given to the second son (not then born) of his brother *Reginald* is expressed to be an estate for life: and no words of limitation were meant, or can with any propriety of construction be applied to the second son of *Reginald*; and consequently, none that can operate so as to enlarge the estate for life expressly devised to him.

It must be confessed, that there is an inaccuracy or confusion in the wording of the devise that is to take place immediately after the death of *Reginald's* second son. The words are "And from and after the death of the said second son of my said brother *Reginald Brown*, then to the first son of the body of such second son of my said brother *Reginald Brown*, and to the heirs male of the body of SUCH SECOND SON; and for default of such issue, to the third, fourth, fifth, and every other younger son or sons of the said second son of my said brother *Reginald Brown*, and to the heirs male of the bodies of the said third, fourth, fifth, and other sons of the said second son of the said *Reginald Brown*."

But there can be no manner of doubt, that this is owing to a mere accidental omission in transcribing the fair copy of this will from the original rough draught of it. It is evident, that a line is inadvertently left out: and it is most clear, what that line must have been. The devise immediately after the death of *Reginald's* second son is "To the first son of such second son's body, and to the heirs male of the body of such."—Thus far the transcriber copied the draught right. But here he has plainly omitted the following words—"First son lawfully to be begotten; and for want of such issue, then to the second son of the body of such second son of my said brother *Reginald Brown* lawfully to be begotten, and to the heirs male of the body of such."—If these words had been inserted, the clause had been quite clear, sensible, and methodical. By supplying the omission of them, the limitation in favour of *Reginald's* second son and his descendants will be precisely the same as the testator had before expressly made with regard to *Reginald's* first son and his descendants: which must have been the testator's intention, and appears beyond doubt, upon fairly considering the will, to have been so. He certainly intended to give no estate tail, till he came down to his grandchildren. And if these omitted words are supplied, the second son intended by the will is not the second son of *Reginald*, but the second son of the second son of *Reginald*; not son, but grandson to *Reginald Brown*: which is agreeable to the testator's intention "to limit his estate in suc-

"cession

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* In chancery,
temp. Lord
Hardwicke;
10 Aug. 1745.

"cession to the several descendants of the then *unborn* son of his brother *Reginald*, in the *like* manner as he had before limited it to those of *Reginald's first son*, which first son "was then born." And, to prove that the court might supply this omission, the case of * *Coryton v. Hellier* was cited; where the words "If Sir *John Coryton* shall so long live," were supplied. But whether this omission can or can not be supplied, yet still it shews that the "*second son*" meant in this clause could not be *Thomas* the second son of *Reginald*: for, the very next limitation, to take place in failure of the issue of that second son, is "To the *third son* of *Reginald's second son*." Now there could be no failure of the issue of the person who had a *third son* alive. The event therefore which the testator had in contemplation, and in which event he intended that this *third son* should take, could not be a failure of the issue of the FATHER of that *third son*; but of some other person, concerning whom the questionable words "*Second son*" must be understood, and to whom they must relate.

On the part of the plaintiff, it was further observed, that *Thomas Brown*, the second son of *Reginald*, had himself decided the present question, by applying for and procuring an act of parliament, wherein he is, upon his own suggestion, recited to be tenant for life, with remainder to his first and other sons in tail male successively. His petition for this private act, and the recital in it "That the devise to him "was only for and during the term of his natural life," is a bar to him and those who claim under him, and precludes them from claiming as tenants in tail. And it was said, that Lord *Hardwicke* had solemnly declared so, very lately, in the House of Lords, in Sir *James Mackenzie's* case.

Note—This private act of parliament recites the will, as if it had really been as Mr. *Wedderburne* now supposed that it was meant to have been; and as if it went on, to give an estate in tail male to all and every of the sons of the second son of *Reginald*; and proceeds upon a supposition "That "*Thomas*, the second son of *Reginald*, was tenant for life,"

THE COUNSEL for the DEFENDANTS laid it down as an established rule of law, "That if a devise be to one for life, "and afterwards a limitation, either immediate or mediate, "to the heirs of his body, the devisee takes an estate tail."

Now here the devise is "To the *second son* of *Reginald Brown*, for life; and after his decease, to the first son of "his body and the heirs male of the body of such *second son*."

This

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This is a clear estate tail therefore, in the second son of Reginald Brown. And the inserting a limitation "to the first son of such second son" must be understood as only directing the order of succession according to the laws of primogeniture and the ordinary course of succession; not as a *designatio persone*: for the word "Son" is, in this place, a *nomen collectivum*. Nor was this unborn first son of an unborn father (as the second son of Reginald then was) capable of taking as a purchaser; because a devise "To the first son of a person unborn" is too remote to take effect by way of purchase: and then the case is no more than a devise "To one for life, and to the heirs male of his body;" which is, unquestionably, an estate tail.

As to the INTENTION of the testator—Even supposing it to have been clearly what has been contended for, on the other side; and supposing (though not admitting) "That the imagined omission in the will might be supplied by construction;" yet that intention could not take effect: for it is a limitation of a possibility upon a possibility; and manifestly tends to a perpetuity, by a suspension of the inheritance from vesting, and consequently rendering the estate unalienable for a longer time than the policy of the law allows; which has not yet been permitted to last longer than the compass of a life or lives in being, and one and twenty years beyond.

Though the limitations to the issue male of unborn sons can not vest in them as purchasers, yet they need not be totally rejected. They shew the testator's intention "That such issue should succeed to the estate": and the only way for that intent to take place, is, by construing the unborn sons of Reginald himself to be tenants in tail male; and then their issue will inherit. Whereas, the construction contended for by the plaintiff would totally preclude them from taking, and defeat the intention of the testator "That the estate should continue in his name and blood." The exposition of a will should be such as will best serve to effectuate the general intent of the testator; and whenever a court supplies, by construction, any seeming defect in the language, it is always in order to support, not to defeat the testator's intention: whereas if the supposed omission in the present will were to be supplied by construction, in the manner proposed on the part of the plaintiff, it would be only for the purpose of rejecting it the next moment, as void, and defeating the general intention of the testator.

As to the ACT of PARLIAMENT—It can't vary the real rights of the parties, with respect to persons not claiming under

under it. It could not make any alteration in the limitations of the testator's will. It was solely intended to protect, in all events, the persons who should become lessees, upon the terms of re-building and laying out their money, upon the faith of it. It can't affect a question of right between the claimants under *Joshua Brown's* will.

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On the part of the defendants, were cited the cases of *Coulson and Coulson*, the duke of *Marlborough*, and lord *Gordolphin*, *Hopkins and Hopkins* (*Forrester* 44.) and *Robinson v. Robinson* (ante 38.)

Reply—

As to the limitation "To the heirs of the body of the second son of *Reginald*," which, uniting (as they say) with the former devise "To the said second son, for his life," enlarges his life-estate into an estate-tail.—The answer is, that here is no such limitation: none was meant, nor can any words of limitation be with any propriety applied to the second son of *Reginald*, so as to enlarge his life-estate.

They have argued, that though the law will not permit the unborn issue of an unborn ancestor to take that very same estate which the testator intended to give them; yet, in order to effectuate, as far as may be, the testator's intention, it will give their ancestor a larger estate than was intended for him; namely, an estate tail (under which his issue may take,) instead of a life-estate.

Answer. This construction would be ineffectual to attain the end proposed: because the tenant in tail would thereby have it in his power to defeat the order of succession. And if the policy of the law will not allow the sons of *Thomas* (*Reginald's* second son, unborn when the will was made,) to take that estate which the testator designed they should take, it affords no reason for giving to their father an estate which the testator certainly did not design that he should take; and so, by a disposition which the testator never meant nor thought of, put it in his power to disinherit his issue, and frustrate the testator's declared wish and desire.

THE COURT (namely, Lord MANSFIELD and Mr. Justice WILMOT, the other two judges being absent,) held that *Thomas* the second son of *Reginald* took an estate TAIL.

They

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They could not insert the limitations which the plaintiff's counsel supposed to be left out: and as the will now stood, there was no question in the case.

But *if* the omitted limitations *could* have been supplied by construction, they thought the *unborn* sons of an *unborn* son could *not* have taken; and that, to effectuate the general intention of the testator, the word "*son*" should be construed a word of *limitation*; and an estate *TAIL* given to the second son of *Reginald*.

THIS was the substance of their general opinion.

Their particular expressions were somewhat to the following effect.

LORD MANSFIELD—A court of justice may construe a will; and, from what is expressed, necessarily *imply* an intent not particularly specified in words, but we cannot, from arbitrary conjecture, though founded upon the highest degree of probability, *add* to a will, or *supply* the omissions.

Lord *Hardwicke*, though generally liberal in construing the intent of testators, would *not* supply a *contingency omitted*, in the most favourable case that could exist. A mother devised her real and personal estate to her daughter (who was an only child;) "And *if* she died before she is of age to "dispose thereof," then devised it over. The daughter lived to be married; and died, leaving a daughter, between 20 and 21. Lord *Hardwicke* decreed for the devisee over, as to the *real* estate.*

• *Bellasis v.*
Urthwaite and
Others,
21 February
1737-8.

But *if* words are rejected, or supplied by construction, it must always be in *support* of the manifest intent.

Here, adding the words would *defeat* the general intent: which certainly was "That the issue male of the second son "of *Reginald* should take, *before* it went to the others in remainder." But *if* the words were added, the limitation by the rules of law, would be *void*. A *POSSIBILITY* cannot be devised *upon* a possibility. The *INTENT* cannot be effectuated, *unless* the second son of *Reginald* has an estate *tail*.

The blunder of expression is here *favourable* to the *real* meaning; and therefore *cannot* be supplied by construction: the constant object of which, is, "to *attain* the intent." For *this* purpose, words of limitation shall operate as words of purchase;

chase; implications shall supply verbal omissions; the letter shall give way; every inaccuracy of grammar, every impropriety of terms shall be corrected by the general meaning, if that be clear and manifest. But *here*, to supply the words omitted by mistake or blunder, would introduce a *blunder in law*, and defeat the testator's general view and intention. As the words stand, the second son of *Reginald* took an *estate tail*. The *intent* of the testator cannot be answered, but by giving him an estate tail. Therefore the literal construction is most agreeable to the intent, and must prevail.

The private act of parliament cannot affect *this* question.

Mr. Justice WILMOT.—The question is what this testator intended? and whether we can give it effect, in part?

He intended it to remain in his name and blood. Two of his brothers are dead without issue.

At the time of the testator's death, *William* the first son of *Reginald* was born: *Thomas*, the second, was not. He certainly meant the same estate to *Thomas* as to *William*. But that intention can not take effect, according to the rules of law: you cannot limit a non-entity upon a non-entity; a possibility upon a possibility. It was necessary that the second son should be tenant in tail, in order to give the intention of the testator an effect. If the devise to the son of *Reginald*'s second son should be a nullity, the general heirs at law of the testator would take, though never so many heirs male from *Reginald* should be living. Let his intention therefore take place, as far as it can go: but it can go no further.

The clause of his name and blood is, in effect, saying "That the blood of *Thomas* shall inherit, before it goes to his daughters."

Besides, how can we make wills, and insert words arbitrarily and by conjecture? Words in a will are to be construed as words of limitation, or as words of purchase, as they will best effectuate the intention of the testator: whereas the correcting this blunder (if it be one) must render the will abortive; and disappoint the intention of the testator, to a very high degree.

As to the act of parliament.—It is nothing at all: it is only to empower him to make building-leases: and was intended for the security of the purchasers. The will is there recited, different from what it really is.

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CHAPMAN ex
dimiss.
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BROWN et al.

This is clearly an estate-TAIL. And therefore

Per Cur. unanimously—

JUDGMENT must be for the DEFENDANT.

On the 26th of February 1767, this judgment was AFFIRMED by the LORDS; agreeably to the unanimous opinion of the judges, delivered by Lord Chief Baron Parker.

Rex versus Joseph Hall.

Commitment as a rogue and vagabond, for leaving his wife and children to be maintained by his parish, invalidated, because not alledged therein, that wife and children were chargeable to parish, and because it was not for a limited time,

THE defendant was brought up by *habeas corpus*, from Guildford; having been convicted by two Surrey-justices, as a rogue and vagabond, upon 17 G. 2. c. 5. § 7. (to amend and make more effectual the laws relating to rogues, vagabonds, &c. for running away from his parish, and leaving his wife and children to be maintained by the parish.

Mr. Hall, on behalf of the defendant, objected to the commitment.

1st. That he was not convicted: which he ought to have been.

2d. It is not alledged, "That his wife and children were chargeable to the parish."

3d. He is not committed for any limited time; but—"Till he shall be discharged according to the laws and customs of this realm."

Mr. Mansfield, contra, endeavoured to support the commitment; by 1st. denying that a conviction was necessary; 2dly. by arguing, that the words used were tantamount to an allegation "That they were chargeable to the parish;" 3dly. by attempting to shew that these words of the commitment are equivalent to the direction of the statute, which is "There to remain until the next general or quarter sessions, or for any less time as such justice or justices shall think proper."

Lord MANSFIELD observed, that the 2d. and 3d. objections were sufficient to invalidate the commitment; and it was better not to give any hasty opinion about the necessity of a formal conviction.

The man was DISCHARGED.

Shubrick

Shubrick *versus* Salmond.

1765.

THIS was an action of covenant upon a charter-party of affreightment, by the merchant who hired the ship, against the master of the ship, for a breach of contract in not going to the port of *Winyaw* in *South Carolina*, as he had covenanted to do.

Tuesday, 5 Feb. 1765.

(Mr. Justice Denison and Mr. Justice Yates were absent.)

The declaration set forth, that the defendant, being shortly after bound out on a voyage to the island of *Madeira*, by charter-party under hand and seal dated 22d October 1762, covenanted that he would, directly as wind and weather would permit, after the discharge of that outward bound cargo at the island of *Madeira*, sail and proceed to *Winyaw* in *South Carolina*, or as near thereto as he could safely get; and there stay 40 running days from the time of such arrival, if not sooner dispatched; and load his ship with such rice and other goods as the plaintiff's agents, &c, should tender to be laden: in consideration whereof, the plaintiff agreed to pay him freight at the rate of 4*l.* 10*s.* per ton for every ton delivered at the port of *London*, and also 3 parts of port charges and pilotage &c.

An express covenant shall bind to performance.

In this charter-party is the following PROVISIO—"That if the said ship should not be arrived at *Winyaw* aforesaid by the first day of *March* next ensuing the date of the said charter-party, that then and in such case it should be in the option of the said *Richard Shubrick* his factors or assigns on the said ship's arrival at *Winyaw*, either to load the said ship on the terms aforesaid, or not; or at the then current freight given to ships loading at *Winyaw* for the voyage aforesaid; or to refuse the said ship entirely: so always that such the intention of the said *Richard Shubrick* his factors or assigns was declared to the master of the said ship within 48 hours after his application to the factors or assigns of the said *Richard Shubrick* at *Winyaw*." And for the performance of the covenants, they bind themselves, each to the other, in the penalty of 1200*l.*

The declaration assigned two breaches—1st. That the said ship did not sail and proceed to *Winyaw* or as near thereto as she could safely get, in order to load &c; but on the contrary, the defendant did wilfully absent himself therefrom. 2d. That the defendant did not, on the said 1st of *March* or at any time since, arrive at *Winyaw*; but wilfully absented himself therefrom.

Plea (in bar of the action)—That he did proceed with all convenient speed, and sail to the island of *Madeira*; but

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by reason of *contrary winds and bad weather* and from no other cause, was prevented arriving there till the 16th of February 1763; so that it was *impossible* for him to discharge his outward bound cargo to *Madeira*.

To the 2d breach he made the same plea; and that it was *impossible*, after the discharge of his cargo, to arrive at *Winyaw* by the 1st day of *March*.

To this, the plaintiff demurred generally: and the defendant joined in demurrer.

Mr. *Ashhurst*, for the plaintiff, objected, that these were *bad pleas*: for the defendant was *not discharged* from his engagement; but *bound to perform* it. 'Tis a contract by deed: and there was a *sufficient consideration* at the time of the agreement; though, upon a *deed*, it is *not* so necessary that there should be a *sufficient consideration*.

He compared it to the case of the Earl of *Chesterfield* v. the Duke of *Bolton*, in the *exchequer*, reported in *Comyns* 627; where there was a *covenant to repair*: and though the house was *burnt down*, the tenant was obliged to *rebuild* it. And whenever a man *covenants* to do a thing, he is bound to perform it. So is *Jeakill v. Linne*, *Hetley* 54. And *Paradine v. Jane*, *Aleyn* 26, 27. And *Monk v. Cooper*, 2 *Str.* 763. which was upon a *covenant to pay rent*; and there was also a *covenant to repair*, except in case of fire: the house was burnt; and though the landlord did not *rebuild* it, nor did the tenant enjoy, during the time for which the rent was demanded; yet the tenant was *obliged to pay* the rent, according to his *covenant*.

As the defendant did not arrive at *Winyaw* before the first of *March*, the plaintiff was to have his option "Whether to load him or not."

Mr. *Dunning*, contra, for the defendant. Here was a positive engagement to sail to *Winyaw* in *South Carolina*. On the other hand, there was a positive engagement to pay the freight; with this proviso, that "If the ship did not arrive before the first of *March*, the plaintiff was to have his election, whether to load the ship, or not."

The ship did not arrive: and it is admitted, that it was not the defendant's fault. And therefore, as it did not arrive, the plaintiff was not obliged either to load the ship, or pay

pay any freight. Therefore the *consideration fails*. The proviso is an express discharge from the reciprocal engagement: and the contract is void.

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SALMOND.

The cases that have been cited were lately considered in chancery, and determined not to be law; the case about Prince Rupert, particularly, *Pardine v. Jane*, in *Aleyn*.

The case between Mr. Garrick and Mr. Barry in C. B. was on articles for Barry's performance on the stage. Garrick and Lacey had covenanted to pay him 2l. 12s. 6d. each night that he should act, and to give him a benefit &c. in case Mrs. Cibber should &c. &c. The court held * the contract to be void; because there was no reciprocal obligation.

* I believe this case was never determined.

SOME consideration is necessary, to support the plaintiff's action. And here the consideration of paying the freight *fails*. Therefore there is a great inequality in this contract between the parties: 'tis a covenant on one side only. Therefore the plaintiff's action is not to be supported.

Mr. Ashhurst—in reply. The proviso was introduced in favour of the plaintiff; not to prejudice him, or to excuse the defendant.

The cases I cited do not turn upon the having a remedy over.

In Garrick's case against Barry, there was a want of mutuality from the first entering into the contract. Here, was a good consideration for the defendant's entering into a positive contract. He did so: and he was obliged to perform it.

LORD MANSFIELD—Upon the true construction of this agreement, there is no foundation of fact, for arguing this point of law.

The distinction between implied covenants by operation of law, and express covenants, is that express covenants are taken more strictly. A man may, without consideration, enter into an express covenant, under hand and seal.

Here, each has bound himself by express covenant under hand and seal: and the defendant has broken the covenant on his part.

The plaintiff wanted a ship at Winyaw in Carolina, to load with rice: and therefore he covenanted with the defendant "To freight his ship there." And the defendant co-

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tenants *absolutely* "To go thither" and in order to *quicken* the ship's arrival there, there is a proviso, "That if he gets there by the first of *March*, he is to be certain of a freight: but if he does *not* arrive there before first of *March*, then the plaintiff was to declare in 48 hours, "whether he would freight the ship or not." The defendant therefore thereby became the *insurer of the risque* of his getting there *before* the first of *March*; in which event, he was *sure* of a freight: but he still had a *general chance* of getting a freight even though he should not arrive there till after that time.

The words are *positive* and *express* "That he should go thither." The parties plainly meant that the ship was to go thither. And the consideration fails by his *not* going."

There was another case arising upon a fire, besides what has been mentioned: and all the opinions from the bar were "That though it was a hard case yet the tenant who had *covenanted* to pay the rent, was *bound* to pay it."

Mr. Justice WILMOT was of the same opinion.

* See the distinction, in Aleyn 27.

If the defendant had not *expressly covenanted* to go to this port, and had been unavoidably prevented, without any default in himself; it might have been a different case.* In the case of the exception of fire, the tenant undertook to pay the rent in all events; and was therefore *obliged* to pay it.

Here, the freighter had rice at *Winyaw*. He agrees with the defendant "To go thither." He *expressly covenants* to go, at all events. In order to *quicken* him, it is stipulated by a proviso, "That if he do not arrive *before* the first of *March*, the freighter is to have his option, to load his ship, or not." The consideration to him is his being *sure of a freight*, in case he got there by the first of *March*. But this proviso can not excuse him for not going thither at all, because he could not get there *so soon* as that day; when he had *expressly covenanted* to go to that port.

LORD MANSFIELD—The demurrer must be over-ruled.

JUDGMENT for the PLAINTIFF.

Rex

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Rex versus the Inhabitants of Spotland.

This case is already printed and published, in the Quarto Edition of my SETTLEMENT-CASES. No. 170. P. 527. See it abridged, in the Table.

Rex versus Holmes, Mayor of Wigan.

Thursday, 7
Feb. 1765.

ON Thursday, 22d November last, Mr. Serjeant *Aspinall* and Mr. *Dunning* moved to take off the file the return to a *mandamus* directed to the defendant *Holmes*, commanding him to restore *Edward Leatherbarrow** to the office of an inn-burgess of *Wigan*; on affidavit "That *Holmes* was DEAD "at the time of the return being filed;" (which was upon the last day of last *Trinity* term, on the motion of Mr. *Clayton*.) The import of it was, "That *Holmes* was dead before the motion was made for filing the return."

Whether return to a *mandamus* filed after death of party who made it ought to be taken off the file.

* He was now dead, since the filing of the return; but was alive at the filing of it.

Lord MANSFIELD and Mr. Justice WILMOT—it turns upon this—"Whether the court could have admitted the return to have been filed, if the fact had been disclosed to them."

Note—The *mandamus* issued in 1759: and *Holmes* died about 3 years ago.

The difficulty was, *against whom* to grant the rule; both *Holmes* and *Leatherbarrow* being dead.

The motion ended in this—to stand over till the first day of the present term; Mr. *Clayton* undertaking to shew cause then, and file his affidavit in answer to the present affidavit, a week before the term.

Accordingly—

Mr. *Clayton*, Mr. *Morton*, and Mr. *Wallace*, on Thursday 24th January last, shewed this cause why the writ of *mandamus* and the return thereof should not be taken off the file; viz. That the return was duly MADE in 1759, and then actually signed by the mayor, at a common hall; and in July 1760, delivered over to Mr. *Holt Lee*, the agent for the prosecutors

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cutors of the writ : and the persons commanded by the writ to be restored always afterwards acted as inn-burgesses, in consequence of such restoration. Holmes died in 1762. And Bromley, the present agent for this motion, knew all this ; but has suppressed it. We did not indeed then think it necessary to file it : but we had a right to file it, even after Holmes's death ; and it was no irregularity to do so.

Mr. Serjeant *Aspinall* and Mr. *Dunning*, contra, for the rule.

The return ought not to have been filed AFTER the mayor's death. It can not now be traversed. The mayor gave no authority to file it. And he signed it contrary to the opinion of the corporate assembly.

The only question is, " Whether the court would have ordered the return to be filed, if they had been apprized of the real state of the facts." If they would not, in that case, have ordered it to be filed, they will now order it to be taken off the file.

A bishop's certificate of an excommunication is null and void and of no effect, if not received in the bishop's life time ; and his successor must certify. 8 Co. 69. a. *Trollop's case*.

Lord MANSFIELD asking " Whether there was any limitation to the time of filing returns ; and whether a return can be filed after the death of the party who made it."

Mr. Serjeant *Aspinall*, to prove, " That the return must come into court by the hands of the mayor," cited 12 Mod. 308. *The King v. burrough of Abingdon*. The words there used are—" And the return must come by mayor's hands into court."

Mr. Justice WILMOT—the return was signed in 1759, and kept in the mayor's custody: in July 1760, he delivered it to one *Holt Lee*, who kept it in his hands till after the mayor's death, without filing it. It was filed indeed afterwards, at a time when the mayor could neither civilly nor criminally be answerable : neither was it filed at the application of any of the persons restored ; nor even any claiming under them.

Therefore I have great doubt. I am afraid of the precedent.

Lord

Lord MANSFIELD—It is a return of an act really done : and the persons commanded to be restored ought not to lose their right, merely because the mayor did not file the return. Therefore it would have been a mere matter of form, if the mayor had been alive. The question is, “ Whether his “ death makes any difference.”

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Convictions are never drawn up, till some occasion calls upon the prosecutor to draw them up. There were many at St. Margaret's Hill, which are not drawn up yet.

I suppose, the persons who have now filed this return have some interest in it.

Mr. Atorpe (secondary of the crown-office) informed the court, that the prosecutor might, at any time, have called for the return. And

Mr. Barlow said there were 2 returns drawn at the time ; one, as the mayor's ; the other, as by the corporation : but neither was then filed.

Curia advisare vult.

The opinion of the court was now moved for.

Mr. Justice WILMOT—I think, this return ought not to stand upon the record.

The *mandamus* was moved for, as of course ; and was directed “ To the mayor” alone. I think it ought to have been directed to those who had power to return it. If so, the writ and return seem to be a nullity. But I do not go upon that.

The writs were delivered to the mayor in 1759 ; he called a common hall ; the common hall restored the persons named in the writs ; the mayor then signed a return, “ That he had “ restored them ;” in July 1760, he delivered this return to Holt Lee, their agent : the mayor died in 1762 : in Trinity term 1764, the writs were filed.

The question is, “ Whether they ought to have been filed “ after the mayor's death, under these particular circumstances.”

If the return ought not to have been received, it ought to be taken off the file.

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In general, every return is ambulatory, and in the breast of the person to whom the writ is directed, *till it is filed*. Signing is not necessary, nor material.

The only way of getting off of a return, is by an action or an information against the person who returns it. There was a case in *M. 7 G. 2. Rex v. Wilkes, in Calne*; which went upon this principle, "That it can only be controverted by *an action or information, if it be once received*." But this man was *dead*, before it was received.

Though this *mandamus* is directed to the mayor only; yet he himself understood the return to be made with the *consent of the corporation or common hall*. *

* V. ante,
p. 1486.

This return, if it should stand, may be urged as a *conclusive evidence*, not only "That it was made by him?" but also "That it was made *with the consent* of the corporation." So that, if it is permitted to stand, it will preclude the entering into the question, "Whether it was *with or without* the *consent of the corporation*:" for, this can never be disproved by any evidence: the question cannot be inquired into, either directly or collaterally. It can not be examined in any action or information against him, being *dead* before it was received.

† V. ante,
p. 1486.
Rex v. La-
tham et al.

As long therefore, as this return stands, the question, "Whether the restoration was or was not *with the consent* of the corporation," is bound down, and can never be entered into: for no evidence can *now* be received to controvert this fact of the corporation's consent.

And as it *may* be applied to this purpose, I therefore think the return ought to be taken off the file.

If such intention be *waved*, and that question lies *open*, it may answer my difficulty.

If that question is left open, I am entirely satisfied.

Mr. Attorney General offered to come into any rule for leaving that question open.

Mr. Serjeant *Aspinall*—But nevertheless, *other people hereafter* may make that use of it,

Lord

Lord MANSFIELD—Undoubtedly, that question ought to be left open.

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Mr. Dunning continued to insist on the return being taken off the file; and offered to admit the fact "That the mayor himself did make such a return."

Rex v. Hogarth.

Lord MANSFIELD and Mr. Justice WILMOT—If a returning officer was to die immediately after signing a return and before the filing it, the court might direct an issue to try the validity of it.

Mr. Justice WILMOT—The reason of the * case * Trollop's which has been cited about the bishop's certificate, is, "That case, 3 Co. 69. a. the succeeding bishop may have absolved the man: and therefore the certificate must be signed by the successor."

I consider this return, now, as standing upon the admission of the prosecutors of the writ, "That no other use shall be made of it than barely that the mayor did restore him in fact;" without prejudice to the question concerning the legality of this restoration; or entering into the question about the corporation's concurring with him, or not.

Lord MANSFIELD—Let this be taken down, as by the consent of counsel on both sides, in all the causes.

Rex versus Felix Mac Donald.

Friday, 8 Feb. 1765.

ON Monday last (the 4th of February) Mr. Morton moved to quash an indictment against the defendant for converting his house into an hospital for taking in and delivering lewd, idle, and disorderly unmarried women; who, after their delivery, went away, and deserted their children, whereby the children became chargeable to the parish.

Indictment for converting house into hospital for taking in and delivering lewd, idle, and disorderly unmarried women, quashed.

Lord MANSFIELD took notice, when it was first moved, of the narrow impolitic principles upon which the prosecutors had proceeded; and expressed his surprize, how such a bill could ever be found.

Mr. Attorney General now shewed cause. He said, all that the prosecutors desire, is "That the parish may be indemnified:" for, at present, the parish are burthened with all these bastard-children.

Lord

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Hilary Term 5 Geo. 3. B. R.

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Lord MANSFIELD.—But by what law is it criminal to deliver a woman when she is with child?

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Cur. To be sure, this is ~~not~~ indictable.

RULE made ABSOLUTE, to QUASH
the indictment.

The End of Hilary Term 1765. 5 G. 3.

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Easter Term

5 Geo. 3. B. R. 1765.

The Court was now full: SIR RICHARD ASTON, late Lord Chief Justice of the court of Common Pleas in Ireland, was called a serjeant on the first day of this term; and took his place on the bench in this court, the next day; SIR THOMAS DENISON having resigned, on the 14th of February last.

(1 Black. Rep. 543.
Promotion of Mr. Justice ASTON.
Resignation of Mr. Justice DENISON.

Rex versus Vice-Chancellor &c, of Cambridge.

(1 Black Rep. 547. S. C.)

UPON the death of the late earl of HARDWICKE, a warm contest arose in the university of Cambridge, between the earls of Sandwich and Hardwicke, for the office of HIGH STEWARD.

Thursday, 25 April 1765.

That officer is elected by a *grace*: which must pass the *caput* unanimously, and be assented to by the houses of *non-regents* and *regents*.

Mandamus lies to the keepers of the common seal of the university of Cambridge, commanding them to put it to the instrument of appointment of their high steward, pursuant to a grace passed in senate.

A GRACE passed the *caput*, for the earl of Hardwicke; and was assented to in the house of *non-regents*, by a majority of two; on the 30th of March 1764, it came on in the house of *regents*. The two *proctors* mark the votes, in two lines; under "*placet*" and "*non-placet*." When cast up they were equal.

The case was *new*: and they were at a loss, what to do.

The

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The senior proctor (in the interest of Lord *Hardwicke*) insisted on a second scrutiny; supported by the order of the vice-chancellor. The junior proctor (in the opposite interest) refused going to a second scrutiny; because they both agreed, "That the votes were equal." He insisted on reporting, in form, "That the votes were equal"; which the other refused: and the report must be made by both concurring.

Upon this, the vice-chancellor dissolved the congregation, without any report having been made.

Afterwards, it was discovered, that Mr. *Thomas Pitt*, who had voted in the regents house against the grace, was a master of above five years standing, and therefore ought to have voted amongst the non-regents.

If his vote was bad, the placets had a majority of one.

Mr. *Pitt* was admitted to the degree of master of arts, on 17th July 1758, by virtue of a mandate from the king. On the 18th of July 1758 (the next day) leave of absence was granted to him, as to a person actually created master of arts.

The proctors had, at first, made a mistake; each having omitted to mark the vote of the other: so that, in the paper of the senior proctor, the placets had a majority of one; and in the junior proctor's paper, the non placets had a majority of one. But they soon discovered the cause of the difference; and concurred in setting it right: which made the votes agree, in each paper.

A MANDAMUS was applied for, on Lord *Hardwicke's* behalf; and a rule to shew cause was granted: which rule was drawn up in the manner which will immediately appear: viz.

CAUSE was now shewn, why a mandamus should not issue to the vice-chancellor and others, of the university of Cambridge, to complete the election of the earl of *Hardwicke* into the office of high steward of that university.

The rule was made, first, upon the VICE-CHANCELLOR, to shew cause why a writ of mandamus should not issue, directed to him, requiring him to CONVENE and hold a congregation or convention of the university; to the end and for the purpose, that the proctors of the said university may declare whether the majority of the votes in the regent-house of the said university,

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versity, upon a grace proposed in the said house on the 30th day of *March* last past, for the election or appointment of *Philip* Earl of *Hardwicke* to be high steward of the said university, was against or in favour of the passing of the said grace.

The second part of the rule was upon *Daniel Longmire*, clerk, and *Ralph Forster*, clerk, PROCTORS of the said university, to shew cause why the like writ should not issue, directed to them, requiring them to declare whether the majority of the votes in the regent-house of the said university, upon a grace proposed in the said house on the said 30th day of *March* last, for the election or appointment of *Philip* Earl of *Hardwicke* to be high steward of the said university, was against or in favour of the passing of the said grace.

The third part of the rule was upon the said Vice-Chancellor, *Daniel Longmire*, *Ralph Forster*, *William Roberts*, and *Henry Talbot*, KEEPERS OF THE COMMON SEAL of the said university, to shew cause why the like writ should not issue, directed to them, commanding and requiring them to PUT AND AFFIX the common seal of the said university to an instrument or letters patent appointing the said *Philip* Earl of *Hardwicke* High Steward of the said university, pursuant to the tenor of a grace passed in senate on the said 30th day of *March* last.

THE COUNSEL who now shewed cause on the part of the non placets, were Mr. Attorney General (*Sir Fletcher Norton*), Mr. *Morton*, and Mr. *Blackstone*.

In the first place, they argued, that this *mandamus* could not issue, upon the foot of a *mandamus* "To hold a court-leet:" for, this was not the university's case.

By a charter of *Hen. 1.* The town had the court-leet.

By another of *Hen. 3.* The town had it: NOT the university.

In 4 Ric. 2. The town's people committed outrages against the university: and, the year after, viz.

In 5 Ric. 2. (17 Feb.) The university had their first grant.

In 8 Ric. 2. The university had another grant: which gives them their first power "To summon a jury to make presentments."

In H. 6. They had another grant; (giving them power to remove lewd women &c.)

In

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In 17 H. 8. An award was made by a judge of the king's bench and two serjeants at law—"That nuisances should be corrected in the town-leet."

In 3 Eliz. A charter (like that of H. 6.) makes the first mention of the office of STEWARD.

Therefore they have no PRESCRIPTIVE court-leet; nor have they a GRANT of any. Therefore the high steward is not steward of a court-leet; but only an officer AT WILL of the chancellor.

To prove, "That the court will not issue a mandamus nunciatory"—they cited *Style*, 457. The *protector* and *Craford*; and 1 *Shower* 217, 251.

Secondly—There is no reason, they said, in the present case, to grant a MANDAMUS; because the university of Cambridge is not like an ordinary corporation; but is visitable by the crown, and subject to statutes to be given by the crown, being of royal foundation.

In 3 Ed. 6. The bishop of Ely and others were appointed visitors; and king Edward the Sixth gave statutes, which the university accepted. So did Queen Elizabeth. In the 12th year of her reign, she gave them a new body of statutes, under which they are now governed; and in which, there is no provision for the office of steward: but they direct "That all officers not particularized shall be chosen as the vice-chancellor is to be chosen."

The university, having accepted these statutes, are therefore bound by them. And yet the election now in question was not as the election of a vice-chancellor. Therefore it is null and void.

Thirdly—On another ground, this mandamus should be refused. Lord Hardwicke's grace did not pass. Therefore this mandamus for enforcing it ought not to go. Mr. Pitt voted in the house where he ought to vote. He could not vote in any other place: his *quinquennium* was not expired.

Regents were, in their origin, preceptors.

Regency was originally for one year: it was then enlarged to 2, 3, 4, 5 years. Now from the nature of regency and the

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onus annexed to it, Mr. Pitt continued a regent. A royal *mandamus* can only confer a privilege: it can not exempt from the onus of disputations; and throw it upon others.

The *ordo senioritatis* is now, as it always was. And from the *ordo senioritatis* and the combination-paper, Mr. Pitt's *quinquennium* could not be expired, nor the onus of the *curfus disputationum* taken off from him. He could not be in the combination-paper of his college till 2d July 1759. If so, he voted in his right house.

Fourthly—Lord Hardwicke was not elected; because five others * voted for him in the regent house, who had no right to vote there; namely, 3 persons upon resumed graces; (which are seldom used but for the sake of a job,) dispensing with their standing, and continuing their regency; which dispensing power is contrary to the statutes. The two 'squire beadles also voted, as being in that office: now they were past the time of voting in the regent-house, as masters of arts; for their *quinquennium* was expired. Therefore they ought to have voted in the non-regent house. These facts will be proved.

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* Dr. Roger Long, Henry Hubbard, B. D. Ralph Forster, M. A. Zachariah Brook. D. D. and Samuel Carr, M. A.

Lastly, From the nature of the present rule, there can be no effect of it. For no other congregation can do the act. The then proctors are now out of office, and can not tell (by looking at scratches without names) how Mr. Pitt voted; nor have they any thing whereby to refresh their memories.

Either the former proceedings were a nullity, by the sudden dissolution of the congregation by the vice-chancellor, without proroguing or adjourning it; or else, the Earl of Hardwicke was rejected. If either be true, no *mandamus* ought to issue; nor even if the votes were equal.

The only return that can be made must be "That the votes were equal:" and in that case, the election was null and void.

THE COUNSEL on the other side, for the *mandamus*, were Mr. Yorke; Mr. Solicitor General (*De Grey*) and Mr. Ashurst: but the two last declined adding any thing to what Mr. Yorke had said; as he had been so copious in his argument: which, indeed was very full and elaborate, and too long to be minutely here particularized. What follows may perhaps convey a general view of it.

Mr. Yorke first discussed these two previous points; 1st. Whether the university have a COURT-LEET, whereof the

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high steward is a necessary officer: 2dly. What was the nature of his office as steward of the leet.

1st. He argued, that they have such a franchise. They may have it by *prescription*; and yet may also have a charter confirming it. The 13 Eliz. c. 29. confirms courts-leets and view of frank-pledge to them.

Upon the 2d. previous point, he argued that the office was incident to the court. Consequently, a *mandamus* to admit him to it, is a proper method.

THE GENERAL QUESTION he said is, "Whether the person elected has a corporate right."

The present question is not upon the right of the electors, but of the elected. The court will support such right by a *mandamus*, if it appears.

As to the MERITS—The question will turn upon the right, and upon the remedy.

FIRST—As to the right—He proposed to consider.

1st. The mode of election.

2dly. Mr. Pitt's vote.

3dly. The other five votes (objected to by the other side.)

1st. As to the mode of election—He entered into it at large. First, as to the construction of the statute of 40 Eliz. "De nominatione &c." It does not take in superior officers to those enumerated. And the usage is of above 240 years.

Besides, this new charter does not affect the old prescriptive rights.

The two universities are now considered as *lay-corporations* with temporal rights; not as eleemosynary foundations, as particular colleges are. This puts an end to the right of the crown "to visit them."

The usage shews only a partial acceptance of the statutes of queen Elizabeth.

2dly.

2dly. As to the unqualified votes—He agreed that the regents were originally *teachers* of the younger part of the university; and that they were discharged of this onus, after they had performed it a sufficient time.

Masters of arts became so by three different methods. [And he went through the 3 sorts.] In ordinary cases, the admission is at various times. Mr. Pitt was created on the 17th of July 1758, and on the 18th had leave of absence. He was bound to perform exercises; and in October following, did so. And he was capable of bearing offices, and even of being proctor: for he was created, as well as admitted. And the *ordo senioritatis* is no authority against Mr. Pitt's special admittance by royal mandate on 17th of July; nor the combination-paper: for, Mr. Pitt was created upon his admission, by the words "*Magister incipe*"; and was a graduate on 18th of July 1758. He therefore was disqualified to vote in the regent-house, after his 5 years were expired.

Then he answered the objections to the proctor's oath of secrecy upon collecting the votes in the separate houses.

As to the 2 beadles and the 3 resumed graces—The beadles vote in the regent-house, as being attendant upon the vice-chancellor in that house. And the resumed regencies are common for various reasons: and the usage of doing it is established; and is consistent with the 42d statute of queen Elizabeth.

Second point—The remedy—

The question is "Whether the officer has been elected by a majority of lawful votes."

Here, a stranger interfered and voted, so as to prevent a declaration by the presiding officer.

If *paria sint suffragia*, there is evidence "That a second scrutiny, that is, a second collection (not a counting only) of votes ought to be entered upon." There has been no fault either in the electors, or in the presiding officer.

Even if a *negative* had been declared, the court would have granted a *mandamus*, if the rightful title had appeared to be in the person negatived. Much more, if nothing is wanting but a formal positive declaration.

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Easter Term 5 Geo. 3. B. R.

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REN. V.
CAMBRIDGE
Vice-Chancel-
lor.

† P. & Tr.
33 G. 1.
§ Tr. & M. 4
& § G. 1.
|| V. 1 Strange
382.

Upon informations in nature of *quo warranto*, the defendant must either make a title, or disclaim. But there is no need of a corporate declaration of his election. He then cited several cases from the MSS. of the late Lord Hardwicke; one of them was in † *Honiton*; another, in the § *Devizes*; and a third, in || *Pentryn*. From which cases, he inferred, that if the party elected has a *substantial right*, the court will grant a *mandamus*; though there was no formal declaration of his election.

A *mandamus* to admit may go to the officer, or to the corporation. The return must be the same; it must be either "*Electus*;" or "*Non electus*;" that is, it must answer to the suggestion of the writ. 1 *Siderf.* 209, 210. *Hersford's case*.

The return could not be "That the election was not declared." The case of *Stoughton v. Reynolds*, 2 *Strange* 1045, shews that there was no need of a declaration.

Lastly, He argued *ab inconvenienti*.

As to the accidental change of the proctors—The declaration, he said, would be *only ministerial*.

Adjourned till to-morrow.

Sir *Fletcher Norton* (Attorney General) replied, on the part of the *non placets*.

I could not be present till he was far advanced in his reply. What I heard, was, to the following effect.

He denied that there could be a *partial* acceptance of a charter. It must either be accepted *in toto*, or *not at all*: the corporation to which it is given can not garble it as they please, *taking part*, and *leaving part*.

As to Mr. *Pitt's* vote—He insisted that he could not commence regent till 1759; and could not be a non-regent till 5 years after.

As to the three *resumed* graces—They are intitled to no favour, and are *contrary* to the statutes of queen *Elizabeth*. And there can be no by-law or provisions *contrary* to an accepted charter.

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As to the two 'squire-beadles—They have no right to vote in either house, *virtute officij*: they must vote according to their degrees. And by their degrees, they were undoubtedly non-regents.

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The register (a superior office to the 'squire-beadles) has a chair in the regent-house; and yet goes to the non-regent house, to vote. And the *usage* pretended is of no more than 20 years.

If any one of these 5 have voted in an improper house, it makes an end of the question.

As to Mr. *Yorke's* cases about informations in the nature of *quo warranto*, and the manner of pleading in them, and about the returns of writs of *mandamus*—I see no need to answer them; because they do not apply to the present case.

As to the necessity of a declaration of the election—It depends upon circumstances: in some cases, a declaration is necessary, by the constitution; in others, not. Here, a declaration was necessary, in order to give a complete right.

I rely on the MERITS only: and I say, that on the merits of this case, no *mandamus* can go.

Here is no evidence of a *leet*, nor of any *steward of a leet*; the election was carried on rightly; Mr. *Pitt* voted in the right house; a second scrutiny would have been improper; the two proctors agreed in rectifying their mistake; many of the members were gone, when the second scrutiny was demanded; it was demanded on the sole foot of the proctors' mis-counting; (for Mr. *Pitt's* vote was not then thought of as an objection;) the 5 votes were in the wrong house: upon the whole, a *mandamus* ought not to go, upon the merits.

Lord MANSFIELD thought the matter lay in a narrow compass, and was not attended with any great difficulty.

He then stated the case, from the affidavits; and explained the reasons upon which the court granted the present rule "To shew cause," in the manner they had done, with particular directions for notice to be given to all parties who had any right or concern in the question.

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The university, as a body, have not thought fit to oppose it.

But it is opposed by all the *non placets*, and by some of those persons who have the custody of the common seal of the university.

There are three questions that arise upon this case: 1st. On the validity of Lord Hardwicke's election; 2d. If his right be clear, then whether a *mandamus* is a proper remedy. 3d. If it is, then *how* it ought to be directed.

1st. Question.

First—As to Lord Hardwicke's right.

There does not seem to be the least contradiction, as to matters of FACT, amongst the witnesses on the two different sides; though they differ in opinion as to the right resulting from them.

The mode of election is traced back to the year 1524, (240 years ago.) The affidavits expressly swear "That the mode of electing the *high steward* has been by a *grace*, &c, &c." And to this, there is no contradiction: no one doubted it on the 30th of *March*, the day of the election.

But it is now contended "That the election of high steward ought to have been in the same mode as the election of a *vice-chancellor*." And this is rested on the statutes of queen *Elizabeth*.

But there is a vast deal of difference between a new charter granted to a new corporation, (who must take it as it is given;) and a new charter given to a corporation already in being, and acting either under a former charter or under prescriptive usage. The latter, a corporation already existing, are not obliged to accept the new charter *in toto*, and to receive either all or none of it: they may act *partly* under it, and *partly* under their old charter or prescription.

Whatever might be the notion in former times, it is most certain now, "That the corporations of the UNIVERSITIES are *LAY-corporations*; and that the CROWN cannot take away from them any rights that have been formerly subsisting in them under old charters or prescriptive usage."

The validity of these new charters must turn upon the acceptance of the university.

When

When queen *Elizabeth* gave these statutes, the university of Cambridge was of ancient establishment, and had many prescriptive rights, as well as former charters of very old date. And there was no intention to alter and overturn their ancient constitution. These statutes undoubtedly meant to leave a vast deal upon the ancient constitution of the university; without repealing or abrogating their old established customs, rights, and privileges: nor could the university mean to accept them upon any such terms.

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Therefore I am clear, that the statutes of queen *Elizabeth* can not be set up, to invalidate establishments subsisting long before she was born.

The office of HIGH STEWARD was a very high office in the university, long before she was born; and was possessed by very great men; a much higher office than stewards of courts leet: she never intended to alter the mode of election to it: nor was the mode of election objected to by any body, at the time of this election.

Therefore I am clear that the mode and manner of this election was right.

Then as to the RIGHT of Lord *Hardwicke* under it.

The election was quite fair. The little mistake in the marking was immediately set right. The proctors DECLARED the votes to be equal. No one then thought of the objection to Mr. *Pitt's* vote. But disputes arising upon another matter, the congregation was dissolved.

It is now objected, by Lord *Hardwicke*, "That Mr. *Pitt*, being a stranger in the regent-house, obtruded his bad vote: which vote being disallowed will give Lord *Hardwicke* a majority of one."

This depends upon the validity of Mr. *Pitt's* vote: on which there is no contrariety of evidence, as to the facts.

[He then stated the facts relating to it.]

The whole turns upon the commencement of his inauguration to the degree of master of arts. This depends upon the usage of the university. And it is sworn "That the degree begins from the day of creation, when it is conferred under
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"a royal mandate": and many circumstances of the present case confirm this.

1st. The leave of absence given the next day, infers that he was then a master complete.

2dly. He appears to be obliged to dispute, in October 1758: for he then pays for *dising* (a barbarous term for disputing;) the fees for it being accounted for between the beadles, in October 1758; whereas the fees of those graduates whose right commenced at the next general commencement were not accounted for till 1759.

3dly. What shews "That the degrees of such as take them " by royal mandate must commence from their inauguration," is the combination-paper, and the *ordo senioritatis*. Mr. Pitt's name is not in the former: but it is in the latter, being made after the general commencement in 1758. And the names therein contained are either noblemen, or such as took their degrees by royal mandate. This suggests strongly, "That the degrees of those who take them by royal mandate commence from their creation." And there is no evidence to the contrary. And the expiration of the quinquennium depends upon the commencement of it.

If so, there is a majority of one for Lord Hardwicke; unless the other side can disqualify some of those who voted for him.

Five of them are objected to.

But as to the 3 resumed graces.—There is no pretense that that transaction was done with any improper view or design. And in respect of essential voting, it is quite indifferent: for it is not material, whether they give their vote in one house, or in the other. And it is agreeable to the usage of the university, "That they should vote where they have voted." Therefore there is no objection to them.

As to the squire-beadles.—The usage appears to be, "That they do vote in the regent-house." And it is quite indifferent in itself, what house they vote in: and as they are attendant upon the vice-chancellor who votes in the regent-house, it seems that there is some small reason for their doing so too.

However, the constant usage is sufficient to shew which house they ought to vote in; without assigning the particular reasons upon which such an usage has been founded.

Thus

Thus stands the RIGHT to the office.

The next question is as to the REMEDY.

There is *no other* than what is now applied for. And this is the very reason of the court's issuing the prerogative writ of a *mandamus*; because there is *no other specific* remedy.

It is admitted, that a *mandamus* would lie, if it can be considered as the case of a steward of a court-leet.

But it is said, "That the franchise of the court-leet is in the town of Cambridge, and not in the university."

But the UNIVERSITY have enjoyed it long; and they are now in possession of it; and they have elected Lord Hardwicke under this claim of many ages standing. And the town do not appear, to us, to dispute it.

But if it was not so, I should still think that, as here is *no other specific* remedy, the court ought to grant the writ. And so they will do in ecclesiastical cases, where it appears that there is *no other specific* remedy.

The last question is, how the *mandamus* ought to be DIRECTED. 3d. Question

Mr. Yorke has gone fully into the argument "That the rule for a *mandamus* ought to be founded upon the merits of the ELECTION, and not upon the declaration of the proctors."

The declaration of the proctors can not affect the *substantial* right. The right of election appears to be in LORD HARDWICKE. And I am very clear, that the foundation of the rule should be the *election*.

Even if the proctors had declared *contrary* to the truth of the election, yet the writ ought to have gone. But here was *no* declaration at all.

It now appears, that Lord Hardwicke was duly elected: and the last part of the rule will procure him the proper remedy, without meddling with the two former parts of it.

Therefore the *mandamus* ought to go to the keepers of the seal for the time being, requiring and commanding them to

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put the seal of the university to the instrument of his appointment: and the two former parts of the rule ought to be discharged.

Mr. Justice WILMOT, having first opened the case, entered into the reasons of wording the rule as it now stands: and he thought that it ought to go, as Lord Mansfield had proposed.

If there is a clear *right* in Lord Hardwicke, the court ought, he said, to find out a suitable and adequate REMEDY; and (in his opinion) even to have made a precedent, if they could not have found one: for where there is a *right*, law and justice require that there should be some remedy or other. And he declared that he never saw a clearer case both as to the *right*, and as to the *remedy*, than this appeared to him to be.

This remedy is undoubtedly proper for this right.

Here are vestiges, in the records laid before us, shewing "That there was a *court-leet* in the TOWN of Cambridge 3 or "4 centuries ago." But it does not appear that they have enjoyed or claimed any such franchise for a century or two last past: and they do not appear to be now in possession of any such franchise.

On the contrary, the UNIVERSITY are in possession of a *court-leet* ever since 1690, at least 75 years, exercised by their deputy-steward. Therefore it may be presumed that there has been some grant, surrender, forfeiture, or assignment from the town to them; or something of the like kind: and we can not therefore presume any to be at this time in the TOWN.

But if the presumption was not so strong, upon such a possession; yet how could we say, that the university have usurped a franchise which does not appear to be in any one else?

However, I do not think it material "Whether the university have a right to a *court-leet*, or not." For they have a right to such an OFFICER as a HIGH STEWARD, with a *stipendium*: and he has a right to come here for this writ, this great prerogative writ of *mandamus*, (a remedy which turns more, in my opinion, upon principle than upon precedent;) and we ought to grant it, because there is no other adequate remedy.

The office of high steward appears to have been of 240 years standing: and the greatest men appear to have been chosen into it. If the Earl of Hardwicke has been now duly and regularly elected

elected into it; he ought to have a *mandamus* to admit him to his right.

The next question then is, "Whether Lord Hardwicke was regularly elected, and had a majority of voices in the regent-house."

As to the mode of election—It is objected "That he ought, by the statutes of Queen Elizabeth, to have been chosen as the vice-chancellor is chosen."

But this seems to be an after-thought. The *non placets* all voted in a different manner from that in which a vice-chancellor is elected; namely, by a *grace*: and they made no objection to the mode of election, at the time when they gave their votes, though they do object to it now.

It is the concurrence and acceptance of the university that give the force to the charter of the crown. And they may take and accept the body of statutes or code of laws, separately and distinctly: they are not bound to take all, or leave all. And it appears that they here have in fact done so: for they have always chosen this officer (their high steward) by way of *grace*. I do not think that this superior office of high stewardship is included in this statute which begins with specifying persons of much inferior rank: but if it had been so, we could not have over-turned an usage of 240 years standing, upon words of this statute which might seem contrary to such settled usage. It certainly did not intend to repeal the old customs and usages of the university, except in those cases where the university chose it. And, from filial piety to my alma mater, (the place where I had the honor to be a member and receive my education,) I can not help rejecting the attempt to overturn such an ancient usage, with the utmost indignation.

As to the declaration of the proctors—I think it immaterial; for the question depends not upon that, but upon the real majority of legal votes. Their declaration cannot alter or affect that. If they had made a declaration; and even if such their declaration had been contrary to the truth of the fair and real right, the court must have taken up the matter upon the true and real merits: for, the right to the office attached in Lord Hardwicke upon his having a majority of legal votes. The circumstance of there being "no declaration at all" can not put him in a worse case than if there had been a declaration against him, a *non placet* declaration. If he had a real right, this court ought to give activity to it: and the omission

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omission of a declaration by the proctors, or the falsity of it, can not affect their judgment concerning the legality of the right.

He then expressed his sentiments about the oath of secrecy, which, though it had been much discussed, did not perhaps materially concern the present point, so much as it did the private conscience of the proctor: and he (as Lord Mansfield had before done) declared "That such an oath could not defend the taker of it from giving evidence before a court of justice"; even if it were necessary to understand it in a stricter sense than it seemed to them to import.

As to Mr. PITT's vote—There is a general commencement, and a special one. "*Incipe magister*," is what makes the commencement of the right to the degree, in both cases: he thereby commences master of arts. The difference between the degree by royal mandate, and the ordinary degree is, that an ordinary graduate commences at the general commencement; one under royal mandate commences upon the words "*Incipe magister*" pronounced at the time.

The combination-paper and the *ordo senioritatis* evince this: and the leave of absence consists with it, and confirms it; as it shews that he was then considered as a complete master of arts, and subject to the *onus* of that degree.

He therefore commenced complete master of arts by the word "*Incipe*." Consequently, he was a non-regent when he voted: and therefore his vote was thrown away, and of no validity.

As to the resumed graces and the 'squire beadles—The usage is sufficiently proved; and it is consistent with the statutes, in such cases as are not particularly provided for by them. And these resumed graces do not at all appear to have been made with any improper view or design, or with any relation to the occasion of this election.

Therefore Lord Hardwicke had a majority of legal votes.

It follows that we ought to grant the *mandamus* in the manner it was originally prayed; viz. a *mandamus* to be directed to the keepers of the common seal of the university, commanding and requiring them to put and affix the common seal of the said university to the diploma or instrument appointing the Earl of Hardwicke high-steward of the university, pursuant to the tenure of the grace passed in senate on the 30th of March last.

Mr.

Mr. Justice YATES and Mr. Justice ASTON were unanimously of opinion with Lord MANSFIELD and Mr. Justice WILMOT, "That a *mandamus* ought to go; and that it ought to be directed to the keepers of the university-seal, commanding them to affix it to the diploma of Lord *Hardwicke's* appointment to the office of high steward."

They delivered their opinions at large; and founded them upon the like reasoning as had been already expressed. They agreed, that the question turned upon the *real merits of the election*; not upon the *declaration* of the proctors. They agreed also, that Mr. Pitt voted in the wrong house; his five years being expired; for that, being an honorary graduate, by *royal mandate*, he commenced master of arts upon the vice-chancellor's saying "*Incipe magister*", i. e. from the time of inauguration, and before the general commencement; whereas ordinary regular graduates do not commence so, till the general commencement. And his duty commenced with his degree. They also agreed, that Lord *Hardwicke* appeared to have a clear right; and that all the objections to it were sufficiently answered: and if he had a right, he certainly ought to have a remedy. And Mr. Justice Aston mentioned the case of the king against Dr. Bland, provost of Eton, Mich. 1740. 14 G. 2. B. R. who was commanded by a *mandamus* to affix the college-seal to a presentation by the fellows to a vicarage. Mr. Justice Yates inclined to think that the university appeared to have the court-leet. And he held, that an old corporation, who accept a new charter, may still act under their former charter, or under prescriptive usage.

Lord MANSFIELD—Let the rule be taken in the manner we have directed.

Pillans and Rose *versus* Van Mierop and Hopkins.

ON Friday 25th of January last, Mr. Attorney General Norton, on behalf of the plaintiffs, moved for a new trial. He moved it as upon a verdict against evidence: the substance of which evidence was as follows.

One *White*, a merchant in *Ireland*, desired to draw upon the plaintiffs, who were merchants at *Rotterdam* in *Holland*, for 800*l.* payable to one *Clifford*; and proposed to give them credit upon a good house in *London*, for their reimbursement; or any other method of reimbursement.

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New trial granted upon verdict in favor of defendants, who had undertaken to honour the bill of exchange, plaintiffs should draw upon them.

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The plaintiffs, in answer, desired a confirmed credit upon a house of rank in London; as the condition of their accepting the bill. *White* names the house of the defendants, as this house of rank; and offers credit upon them. Whereupon the plaintiffs honored the draught, and paid the money; and then wrote to the defendants *Van Mierop* and *Hopkins*, merchants in London, (to whom *White* also wrote, about the same time,) desiring to know "Whether they would accept such bills as they, the plaintiffs, should in about a month's time draw upon the said *Van Mierop's* and *Hopkins's* house here in London, for 800*l.* upon the credit of *WHITE*?" and they, having received their assent, accordingly drew upon the defendants. In the interim *White* failed before their draught came to hand, or was even drawn: and the defendants gave notice of it to the plaintiffs, and forbid their drawing upon them. Which they, nevertheless, did: and therefore the defendants refused to pay their bills.

On the trial, a verdict was found for the defendants.

Upon shewing cause, on Monday 11th February last, it turned upon the several letters that had respectively passed between the plaintiffs, and defendants, and *White*. The letters were read: 1st. Those * from *White* and Co. in Ireland, to the plaintiffs in Holland; (by which it appeared that *Pillans* and *Rose* had then accepted the bills drawn upon them by *White*, payable to *Clifford*;) then those of the plaintiffs to the defendants; and also *White's* to the defendants; then those of the defendants to the plaintiffs, † agreeing to honour their bill drawn on account of *White*; the letter from the defendants to the plaintiffs, informing them "That *White* had stop't payment," and desiring them not to draw, as they could not accept their draught; and lastly that which the plaintiffs wrote to the defendants, "That they should draw on them, holding them not to be at liberty to withdraw from their engagement."

* Dated 16th
Feb. 1762.

† Dated 19th
March 1762.

THE COUNSEL for the defendants were Mr. Serjeant *Davy* and Mr. *Wallace*. They observed that the plaintiffs had given credit to *White*, above a month before the defendants had agreed to accept their draught. For it appears by *White's* letter of 16th February 1762, that *Pillans* and *Rose* had then actually accepted *Clifford's* bills: but *Van Mierop* and *Hopkins* did not agree to honor their draughts till 19th of March 1762. Therefore the consideration was past and done, before their promise was made. And they argued, and principally insisted, that for one man to undertake "To pay another man's

2. debt,"

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PER LANA: and
Another at
Max non said
Another.

• See likewise
Hardres 72,
73, 74.

"*Ubi*," was a void undertaking; unless there was *consideration* for such undertaking; and that a mere general promise, without benefit to the promiser, or loss to the promisee, was a *nudum pactum*. And they cited *Bulstr.* 120. *Thornor v. Field*. *Dyer* 272. pl. 31. *Hunt v. Butts*. 20 *Vern.* 224, 225. *Cecil et al. v. Earl of Salisbury*. 1 *Ro. Abr.* 11. pl. 1. *Letter Q*: "Consideration executed." *Fido* 40. 41. and 2 *Strange*, 933. *Hoyes v. Warren*; where a *post* consideration was holden insufficient to raise an *assumpsit*.

THE COUNSEL for the plaintiffs were Mr. Attorney General, Mr. Walker and Mr. Dunning. They denied this to be a *post* consideration; and insisted, that the liberty given to the plaintiffs, "To draw upon a confirmed house in London," (which was prior to the undertaking by the defendants,) was the consideration of the credit given by the plaintiffs to White's draughts; and that this was a good and sufficient consideration for the undertaking made by the defendants. It relates back to the original transaction.

If any one promises to pay for goods delivered to a third person; such promise, being in writing, is a good one. And here White had had 800*l.* from the plaintiffs, upon this assurance: and the defendants undertake in writing, in pursuance and completion of this original assurance, to be answerable for White's reimbursing the plaintiffs. And a promise in writing is out of the statute.

This case does not fall within those that have been cited: for Van Mierop and Hopkins have made themselves originally liable. An *ex post facto* event cannot alter the nature of an original promise. Their original promise made them liable, and bound them. And they are obliged, both by law, and in honour and honesty, to perform it.

It is a mercantile transaction: and it must be considered, upon the whole of it, as an admittance "That the defendants either had or soon would have effects of White's in their hands."

LORD MANSFIELD—The objection is, "That the letter whereby Van Mierop and Hopkins undertake to honour the plaintiff's bills, is *nudum pactum*." The other side deny it.

This is the only question, here.

But this is quite different from what passed at the trial: the *nudum pactum* was not mentioned at that time. The grounds

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grounds it was argued upon *there*, were 1st. That this imported to be a credit given to *Pillans* and *Rose*, in prospect of a *future* credit to be given by them to *White*; and that this credit might well be countermanded *before* the advancement of any money: and this is so. 2dly. That there was a *fraud*: for that *Van Mierop* and *Hopkins* had reason to think that *White* had sent goods to *Pillans* and *Rose*; whereas, this was a mere *lending of credit*. 3dly. That if *Pillans* and *Rose* had received goods from *White*, and retained them till he failed, the defendant's undertaking was revocable.

I was then of opinion, that *Van Mierop* and *Hopkins* were bound by their letter; *unless* there was some *fraud* upon them; for that they had engaged under their hands, in a *mercantile transaction*, "To give credit for *Pillans* and *Rose's* reimbursement." And I did not see it to be *future*, as had been objected: nor did I see any *fraud*. And nothing was then argued about its being *nudum pactum*.

I have no idea, that promises "For the debt of another," are applicable to the present case.

THIS is (as Mr. *Walker* said) a *mercantile transaction*; and it depends upon these letters from merchant to merchant about *honouring bills*, to such an amount: and this credit is given upon a supposition "That the person who is to draw" upon the undertakers within a certain time, *has goods* in his "hands, or *will have* them." Here, *Pillans* and *Rose* trusted to this undertaking: and there is *no fraud*. Therefore it is quite upon *another foundation* than that of a *naked promise* from one, "To pay the debt of another."

Mr. Justice WILMOT—I own, the want of consideration, at first, occurred to me. But I now am satisfied, that this case has nothing to do with the cases of undertakings by one "To pay the debt of another." In *those* cases, it is settled, "That where the consideration is past, the action" will not lie: and yet this seems a *hard* case. The mere promise "To pay the debt of another," without any consideration at all, is *nudum pactum*: but the *least spark* of a consideration will be sufficient. It seems almost implied, that there must be *some* consideration: but if there be none at all, it is *nudum pactum*. The statute must mean such a special promise as would have supported an action,

But all this is out of the *present* case. So also, I think, is all the *precedent* correspondence.

It lies in a narrow compass.

White, Pillans and Rose, and Van Mierop and Hopkins had all a correspondence together: they have intercourse together, mutually in mercantile transactions. *Pillans and Rose* write to *Van Mierop and Hopkins*, to know "Whether they will honour their draughts for 800*l.* in about a month's time." They say, "They will." Now it strikes me, (as *Mr. Walker* said) that it admits "That they either have assets or effects of *White's* in their hands," or "That they have credit upon him." Now by this undertaking of a good house in London, and relying upon it, they are deluded and diverted from using any legal diligence to pursue *White*, or even not to part with any effects of his which they might have in their hands. Therefore this seems to be an irrevocable undertaking by *Van Mierop and Hopkins*: and they ought to be bound by it. Consequently, there ought to be a new trial.

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LORD MANSFIELD—A letter of credit may be given as well for money already advanced, as for money to be advanced in future.

Let it be argued again the next term; and you shall have the opinion of the whole court.

Ulterius Concilium.

Yesterday, this matter accordingly came on again; and was argued by *Mr. Wallatt*, for the defendants; and by the same counsel as argued last term, for the plaintiffs.

The latter repeated and enforced their arguments. They said the consideration moved from *White* to the defendants; not from the plaintiffs *Pillans and Rose*, to the defendants: and as the defendants have undertaken for *White*, they can't revoke or retract their engagement.

This case is not like the cases cited: some of which are strange cases, and not founded on solid or sufficient reasons; and in others of them, there was no meritorious consideration at all. And *Mr. Walker* cited *Hardres* v. *Reynolds* v. *Proffer*; where the consideration was adjudged sufficient, notwithstanding all the reasoning of *Sir Thomas Hardres*, and all the cases cited by him. That was an *assumpsit* by a stranger, in consideration that the plaintiff would forbear to prosecute *Lord Abergavenny* upon a judgment, in the name of the original plaintiff, by virtue of a letter of attorney "To receive it to his own use."

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Another.

Serjeant *Davy* was heard, this morning, on behalf of the defendants; and urged, that the plaintiffs gave credit to *White*, upon his promising to reimburse them: and he said, there was a fraudulent concealment of facts.

White's first letter could have no influence on the plaintiffs. For they afterwards desired a confirmed credit upon a house of rank in *London*: so that they did not rely on *White's* first letter which offered credit on the defendants, or any other method of reimbursement. And nothing had then passed between *White* and the defendants. For the first letter between them was on the 16th of *February* (a fortnight after:) and then the defendants were deceived into a false opinion "That it was for a future credit, and not to secure a past acceptance of *White's* bills by the plaintiffs." And this concealment of circumstances is sufficient to vitiate the contract. The plaintiffs had accepted a bill of 800 l. of *White's*, a fortnight before the defendant's letter of 16th *February*: which bill the plaintiffs had accepted upon assurance of credit on a house in *London*, to reimburse them. And this transaction was fraudulently concealed, both by *White* and the plaintiffs, from the defendants. If this had been disclosed, the defendants would have plainly seen "That the plaintiffs doubted of *White's* sufficiency;" by their requiring further security for his already contracted debt.

All letters of credit relate to future credit; not to debts before incurred: nor can the advancer of money thereupon, include an old debt before incurred.

A bill can not be accepted before it is drawn. This is only a promise to accept: for it is only a promise "To honour the bill; not a promise to pay it."

A promise "To pay a past debt of another person" is void at common law, for want of consideration; unless there be at least an implied promise from the debtee "To forbear suing the original debtor." But here was a debt clearly contracted by *White* with the plaintiffs on the credit of *White*: and there is no promise from the plaintiffs "To forbear suing *White*." A naked promise is a void promise: the consideration must be executory, not past or executed.

Lord *MANSFIELD* asked, if any case could be found, where the undertaking holden to be a nudum pactum was in writing.

Serjeant

Serjeant *Davy*—It was *antiently* doubted “Whether a written acceptance of a bill of exchange was binding, for want of a consideration.” It is so said, somewhere in *Lutwyche*.

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Another.

Lord MANSFIELD—This is a matter of great consequence to trade and commerce, in every light.

If there was any kind of *fraud* in this transaction, the *collusion* and *mala fides* would have *vacated* the contract. But from these letters, it seems to me clear, that there was *none*. The first proposal from *White*, was “To reimburse the plaintiffs by a remittance, or by credit on the house of *Van Mierop*”: this was the *alternative* he proposed. The plaintiffs chose the *latter*. Both the plaintiffs and *White* wrote to *Van Mierop* and company. They answered “That they would *honour* the plaintiffs draughts.” So that the defendants assent to the proposal made by *White*, and ratify it. And it does not seem at all, that the plaintiffs then doubted of *White*’s sufficiency, or meant to conceal any thing from the defendants.

If there be *no* fraud, it is a mere question of *law*. The law of *merchants*, and the law of the *land*, is the *same*: A witness can not be admitted, to prove the *law* of merchants. We must consider it as a point of *law*. A *nudum pactum* does not exist, in the usage and law of merchants.

I take it, that the ancient notion about the want of consideration was for the sake of *evidence* only: for when it is reduced into *writing*, as in covenants, specialties, bonds, &c,* • V. ante, there was no objection to the want of consideration. And P. 1639. the statute of frauds proceeded upon the same principle.

In *commercial* cases amongst merchants, the want of consideration is *not* an objection.

This is just the same thing as if *White* had drawn on *Van Mierop* and *Hopkins*, payable to the plaintiffs: it had been nothing to the plaintiffs, whether *Van Mierop* and Co. had effects of *White*’s in their hands, or not; if they had *accepted* his bill. And this amounts to the same thing:—“I will give the bill due honour,” is, in effect, *accepting* it. If a man agrees “That he will do the formal part,” the law looks upon it (in the case of an acceptance of a bill) as if *actually done*. This is an engagement “To accept the bill, if there was a necessity to accept it; and to pay it, when due.” and they *could not afterwards retract*. It would be

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very destructive to trade, and to trust in commercial dealing, if they could. There was nothing of *nudum pactum* mentioned to the jury; nor was it, I dare say, at all in their idea or contemplation.

I think the point of law is with the plaintiffs.

Mr. Justice WILMOT—The question is, “Whether this action can be supported, upon the breach of this agreement.”

I can find none of those cases that go upon its being *nudum pactum*, that are in writing: they are all, upon parol.

I have traced this matter of the *nudum pactum*: and it is very curious.

He then explained the principle of an agreement being looked upon as a *nudum pactum*; and how the notion of a *nudum pactum* first came into our law. He said, it was echoed from the civil law:—“*Ex nudo pacto non oritur actio*.” Vinnius gives the reason, in lib. 3. tit. *De Obligationibus*, 4to edition, 596. If by stipulation, (and à fortiori, if by writing,) it was good without consideration. There was no radical defect in the contract, for want of consideration. But it was made requisite, in order to put people upon attention and reflection, and to prevent obscurity and uncertainty: and in that view, either writing or certain formalities were required. *Idem*, on Justinian, 4to edit. 614.

Therefore it was intended as a guard against rash inconsiderate declarations: but if an undertaking was entered into upon deliberation and reflection, it had activity; and such promises were binding. Both Grotius and Puffendorff, hold them obligatory by the law of nations. Grot. lib. 2. c. 11. *De Promissis*. Puffend. lib. 3. c. 5. They are morally good; and only require ascertainment. Therefore there is no reason to extend the principle, or carry it further.

There would have been no doubt upon the present case, according to the Roman law; because here is both stipulation (in the express Roman form) and writing.

* Sub ultima
tempora regis
H. 3.

Bracton (who wrote * temp. Hen. 3.) is the first of our lawyers that mentions this. His writings interweave a great many things out of the Roman law. In his third book, cap. 1. *De Actionibus*. He distinguishes between naked and clothed contracts. He says that “*Obligatio est mater actionis*,” and that it may arise *ex contractu, multis modis; sicut ex conventionione &c;*;

sunt sunt pacta, conventa, quæ nuda sunt aliquando, aliquando vestita, &c., &c.

Our own lawyers have adopted exactly the same idea as the Roman law. * *Plowden* 308. b. in the case of *Sherington and Pledal v. Strotton and others*, mentions it: and no one contradicted it. He lays down the distinction between contracts or agreements in *words* (which are more base,) and contracts or agreements in *writing*, (which are more high;) and puts the distinction upon the *want* of deliberation in the former case, and the full *exercise* of it in the latter. His words are the marrow of what the *Roman* lawyers had said. "*Words*" pass from men *lightly*:" but where the agreement is made by *deed*, there is more *stay*; &c. &c. For, first, there is &c. &c.; and thirdly, he delivers the writing as his deed. "The *delivery* of the deed is a ceremony in law, signifying fully his good will that the thing in the deed should pass from him who made the deed, to the other. And therefore a deed, which must necessarily be made upon great thought and deliberation, shall bind, without regard to the consideration."

The *voidness* of the consideration is the *same*, in reality, in both cases: the reason of adopting the rule was the *same*, in both cases; though there is a difference in the *ceremonies* required by each law. But *no inefficacy* arises merely from the naked promise.

Therefore, if it stood *only* upon the naked promise, it's being, in this case, reduced into *writing*, is a *sufficient guard* against surprise: and therefore the rule of *nudum pactum* does not apply in the present case.

I can not find, that a *nudum pactum* evidenced by *writing* has been ever holden bad; and I should think it good; though, where it is *merely verbal*, it is bad. Yet I give *no opinion* upon it's being good, *always*, when in *writing*.

Many of the old cases are strange and absurd: so also are some of the modern ones; particularly, that of *Hayes v. Warren*.*

I have a very full note of this case. The reason of the reversal of the judgment was, "That it did not appear by the declaration, to be either for the *benefit*, or at the *request* of the defendant."

It is now settled, "That where the act is done *at the request* of the person promising, it will be a sufficient foundation to graft the promise upon."

F f 3

In

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* This probably, was Plowden's own argument. I suppose, he was himself that apprentice of the Middle Temple who argued for the defendants.

* V. 2 Sir
J. S. 933.

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† Church and
Church's case ;
cited in Raym.
250.

† V. 2 Leon.
111.

§ For, between
Ireland and
Holland, each
usance is one
month.

In another instance, the strictness has been relaxed : As for instance, † burying a son ; or ‡ curing a son ; the considerations were both *past* ; and yet holden good. It has been melting down into common sense, of late times.

However, I do here see a *consideration*. If it be a *departure from any right*, it will be *sufficient* to graft a *verbal* promise upon. Now here, *White*, living in *Ireland*, writes to the plaintiffs "To honour his draught for 800 l. § payable ten *weeks after*." The plaintiffs agree to it, on condition that they be made safe at all events. *White* offers good credit on a house in *London* ; and draws : and the plaintiffs accept his draught. Then *White* writes to them, "To draw on *Van Mierop and Hopkins* : to whom the plaintiffs write, "To inquire if they will honour their draught : " they engage "That they will." This transaction has *prevented, stopt, and disabled* the plaintiffs from calling upon *White*, for the performance of his engagement. For, *White's* engagement is *complied with* : so that the plaintiffs could not call upon him for this security. I do not speak of the *money* : for, *that* was not payable till after two usances and a half. But the plaintiffs were prevented from calling upon *White* for a performance of his engagement "To give them *credit on a good house in London, for reimbursement* : " so that here is a good consideration. The law does not weigh the *quantum* of the consideration. The *suspension* of the plaintiff's right "To call upon *White* for a compliance with his engagement" is *sufficient* to support an action ; even if it be a suspension of the right, for a day only, or for ever so little a time.

BUT to consider this as a *commercial case*. ALL nations ought to have their laws conformable to each other, in such cases. *Fides servanda est : simplicitas juris gentium pravealeat. Hodierni mores* are such, that the old notion about the *nudum pactum* is not strictly observed, as a rule.

On a question of this nature, "Whether by the law of *nations*, such an engagement as this shall bind—" ; the law is to judge.

The *true reason why the acceptance* of a bill of exchange shall bind, is not on account of the acceptor's having or being supposed to have effects in hand ; but for the convenience of trade and commerce. *FIDES est servanda*. An acceptance for the honour of the drawer, shall bind the acceptor : so shall a *verbal* acceptance. And whether this be an *actual* acceptance, or an *agreement to accept*, it ought equally to bind. An agreement

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agreement "To accept a bill to be drawn in future" would (as it seems to me) by connection and relation, bind, on account of the antecedent relation. And I see no difference between it's being *before* or *after* the bill was drawn. Here was an agreement sufficient to bind the defendants to pay the bill: agreeing "To honour it," is agreeing to pay it.

I see no sort of fraud. It rather seems as if the defendants had effects of *White's* in their hands. And it does not appear to me, that the defendants would not have honoured the plaintiffs' draughts, even though they had known that it was future credit.

But whether the plaintiffs or the defendants had effects of *White's* in their hands, or not; we must determine on the general doctrine.

And I am of opinion, that there ought to be a new trial.

Mr. Justice YATES was of the same opinion. He said it was a case of great consequence to commerce: and therefore he would give both his opinion and his reasons.

The arguments on the side of the defendants terminate in it's being a *nudum pactum*, and therefore void.

This depends upon two questions.

1st. Question—"Whether this be a promise without a consideration?"

2d. Question—"If it is, then "Whether this promise shall not be binding, of itself, without any consideration?"

First—The draught drawn by *White* on the plaintiffs, payable to *Clifford*, is no part of the consideration of the undertaking by the defendants. The draught payable to *Clifford* is never mentioned to the defendants. They are asked "Whether they will answer a draught from the plaintiffs upon them?" they answer "They will honour such a draught on them."

Whether the defendants had or had not effects of *White's* in their hands, is immaterial.

ANY damage to another, or suspension or forbearance of his right, is a foundation for an undertaking, and will make

* V. Coggs
v. Bernard,
2 Ld. Raym.
919.

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it binding; though *no actual benefit* accrues to the party under-
taking; no *benefit* accrues to the party under-

Now here, the promise and undertaking of the defendants did occasion a possibility of loss to the plaintiffs. It is plain that the plaintiffs would *not* rely on *White's assurance ONLY*; but wrote to the defendants, to know if they would accept their draughts. The credit of the plaintiffs might have been hurt, by the refusal of the defendants to accept *White's bills*. They were or might have been prevented from *resorting to him*, or getting *further security from him*. It comes within the cases of promises, where the debtor *forbears suing* the original debtor.

Second question.—Whether, by the *law of merchants*, this contract is not binding on the defendants; though it was without consideration.

The acceptance of a bill of exchange is an obligation to pay it: the end of their institution, their currency, requires that it should be so. On this principle, bills of exchange are considered, and are declared upon as *special contracts*; though, legally, they are only *simple contracts*: the declaration sets forth the *bill and acceptance specifically*; and that thereby the defendants, by the custom of merchants, became liable to pay it.

This agreement “To honour their bill” was a *virtual acceptance* of the bill. An acceptance needs not be upon the bill itself: it may be by *collateral writing*. *Wilkinson v Lutwidge*. 1 Strange 648.

A PROMISE “To accept” is the same as an *actual acceptance*. And a small matter amounts to an acceptance: and so says *Molloy*, lib. 2. c. 10. § 20. And an acceptance will bind, though the acceptor has *no effects* of the drawer in his hands; and *without any consideration*. *Symons v. Parminter*, * Hil. 1747. 21 G. 2. B. R. And a bill accepted for the honour of the drawer, will also bind.

* This was on a motion in arrest of judgment. The judgment was affirmed (ex parte) in dom. proc. with 100 l. costs, upon or soon after 20th Feb. 1748.

Then he applied these positions to the present case. It was an acceptance of this very draught, by *relation and connexion*; though the bill was not then drawn by the plaintiffs on the defendants.

But even if it did not amount to an *actual acceptance*, yet it would *equally bind* the defendants: they would be equally obliged to perform the *effect* of their undertaking.

The

The plaintiffs apprized the defendants of their intention to draw; and the defendants promised "To honour their draught:" and the plaintiffs, of course, would regulate their conduct accordingly.

Therefore, upon the whole circumstances of this transaction, 1st. There is a consideration; and 2dly. If there was none; yet, in this commercial case, the defendants would be bound.

Mr. Justice ASTON—I am of opinion "That there ought to be a new trial."

If there be such a custom of merchants as has been alledged, it may be found by a jury: but it is the court, not the jury, who are to determine the LAW.

This must be considered as a commercial transaction; and is a plain case. The defendants have undertaken to honour the "Plaintiff's draught," Therefore they are bound to pay it.

This can not be called a *nudum pactum*. The answer returned by the defendants is an admission of "Having effects of White's in their hands," if that were necessary. And after this promise "To accept" (which is an implied acceptance) they might have applied any thing of White's that they had in their hands, to this engagement; even though White had drawn other bills upon them in the interim. The defendants voluntarily engaged to the plaintiffs: and they could not recede from their engagement.

As to it's being a *nudum pactum* (which matter has been already so well explained—) if there be turpitude or illegality in the consideration of a note, it will make it void, and may be given in evidence: but here nothing of that kind appears, nor any thing like fraud in the plaintiffs. Here was full notice of all the facts; a clear apprehension of them by the defendants; a question put to them, "Whether they would accept"; and their answer, "That they would."

Upon the whole he concurred, "That an action will lay for the plaintiffs against them; and that the plaintiffs ought to recover."

By the COURT, unanimously,

THE RULE "To set aside the verdict and for a new trial," was made ABSOLUTE.

Lock-

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PILLANS and
Another v.
MIEROP and
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Thursday, 2
May 1765.

Lockwood *versus* Dr. Coysgarne.

Privilege denied
to a domestic
physician to a
public foreign
minister, it ap-
pearing to be a
mere scheme to
screen him from
his debts.

UPON shewing cause (on *Saturday* 27th of last month) why execution should not be set aside, and the goods taken in execution by the plaintiff, restored the defendant,

The facts appeared upon the affidavits, to be as follows, as nearly as I could take them, upon the reading.

The defendant had been protected by the *Morocco* ambassador: upon whose departure from *England*, the plaintiff proceeded against the defendant, being then unprotected; and obtained judgment against him. The defendant brought a writ of error. Whilst this writ of error was depending, viz. on 14th *June* 1764, he was hired to Count *Haslang*, the *Bavarian* minister, as his physician, at 40*l.* a year salary; though Dr. *Redmond* then stood upon the list, as physician to Count *Haslang*; and even still remains upon the said list, as such. The defendant swore, that he had prescribed to some of the count's servants: and he also swore, that since the said 14th of *June* 1764, he never prescribed to any other persons but the count's family. It appeared that the defendant kept a coach, and had livery servants of his own. It appeared that he had formerly been a trader; but had left off: but it was not ascertained where, or for how long time, he had practised as a physician. Soon after he was hired to Count *Haslang*, the count's own secretary sent to the sheriff of *Surrey* (who had an execution against the defendant,) to acquaint him "That the defendant was protected by Count *Haslang*."

The question was, "Whether the defendant was intitled to the * privilege of a foreign minister's domestic servant, viz. "physician to Baron *Haslang*;" that is, whether he was really and *bonâ fide* his servant; or, whether it was only a collusive hiring, a colourable service, a mere sham and pretence, in order to screen him from paying his just debts.

• V. 7 Ann.
c. 12. and
V. ante,
p. 1478.
Bath's case,
S. P. fully
discussed.

It was then ADJOURNED.

Lord MANSFIELD now observed upon the act of 7 *An.* c. 12. that there is not an exception in it, but what is agreeable to and taken from the law of nations.

The privilege of a foreign minister extends to his family and servants: and this privilege has been long settled, to extend

tend to the servants who are natives of the country where he resides, as well as to his foreign servants, whom he brings over with him.

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DR. COYSE
GARNER

By the law of nations, a foreign minister can not give a protection to a person who is not *bonâ fide* of his family.

The question therefore is, "Whether this defendant is *bonâ fide* a domestic physician to a foreign minister": (I do not mean that it is necessary that he should lie in his house.)

His lordship occasionally took notice of the negligent manner in which the lists are kept at the sheriff's office: and then proceeded, to the purport following.

As to the question "Whether this is a *bonâ fide* service, or *merely colourable*"—It does not appear, that this defendant ever prescribed to any one person in the world, as a physician, before he was hired by Count HASLANG. Then he was hired on the 14th of June last, just when he found it necessary to be protected from this debt. And Dr. Redmond then was and now remains upon the list, as the count's physician. This man's very retainer is in the form of a protection from his debts; which is a suspicious circumstance. Then what has he done, as a physician? he swears he has prescribed to some of the servants: but no particulars are specified. He lives at Vaux-hall; and keeps a coach and livery servants.

Binkershoek, de Foro Legatorum, says, "That a person in debt can not be taken into the service of a foreign minister, in order to protect him." And indeed this would give the foreign minister a power to dispense with the private debts of the subjects of this country.

Now here was actually judgment against him; only suspended by a writ of error. He was before protected by the Morocco ambassador: and when he went home, then the defendant got this protection. Kellerhoff, Count Haslang's secretary, soon after sent to the sheriff of Surrey, who had an execution against him; acquainting him "That this man was protected by Count HASLANG." The secretary himself swears this: which shews the view to have been the protection. But a foreign minister can not protect, by way of screening a debtor from paying his just debts. He has no such privilege.

Then his salary is but 40 l. a year; and he swears "That he never since the 14th of June prescribed to any other person"

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"person but the ambassador's family." And yet he lives in splendor, and keeps several livery-servants. This dilemma is clear: either he had no patients before; or it was not really and fairly worth his while to quit his profession, for a temporary salary of 40 l. a year.

Therefore his lordship was clear, that this was not a fair *bonâ fide* transaction; and, consequently, that the defendant was not intitled to the privilege he now claimed.

At the same time he declared, that the statute of 7 Ann. was only declaratory of the law of nations, and that the law of nations was in full force in these kingdoms.

Mr. Justice WILMOT concurred with Lord MANSFIELD, as to observing the act of 7 Ann. c. 12. in all cases properly and fairly brought within its true meaning and intent. But he was clear, that Dr. Coysgarne was not what he pretends to be; that is, a *real* physician. He owns he has been a trader; (though he has left it off:) but he does not ascertain *when* or *where* he practised as a physician. If he was not, why should the count retain him as a physician? and he is to have but 40 l. a year, for board AND service as a physician. Here is no proof of any of his prescriptions being ever taken by any of the count's family; nor even of their being made up: neither is it usual to retain physicians. Domestic physicians are not the custom of modern ages; though it was customary amongst the ancients. Therefore I have doubt about this character that he claims, of a *domestic servant*. The profession of a physician is honorary; and the retainer should come from the ambassador: whereas this man offered himself; and it is plain enough that it was done with a *view* to this protection.

Therefore he does *not* appear to me to be the *domestic servant* of a foreign minister. He was before protected by the Morocco ambassador: he is gone home. Then after his departure, and when that pretence could no longer serve him, and the plaintiff had got judgment, he brings a writ of error, and gets this protection. But an ambassador can not PROTECT; it is the law that gives the protection. Whereas here, the secretary sends notice to the sheriff "That the count has protected him." The *view* therefore is manifest: and the defendant does not seem to be intitled to the character that he has assumed.

It will be of very bad consequence, if protections should be set up to sale, or made use of merely for the sake of screening people from paying their just debts.

The

The two other judges, Mr. Justice YATES and Mr. Justice ASTON, concurred, for the same reasons; being thoroughly satisfied, upon the circumstances of this case laid all together, and upon the whole complexion of it, "That this was not a *bonâ fide* service, but a scheme to screen him from the payment of his debts." And Mr. Justice ASTON mentioned the case of *Wigmore v. Alvarez*: [which see cited, together with others on this subject, ante, p. 1479. in *Bath's case*.]

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Per Cur. unanimously and clearly,

RULE DISCHARGED.

Mr. Walker prayed that it might be discharged *with costs*. But costs were not added; because Mr. Kelly, the attorney who appeared to support the rule, declared in court (on Lord Mansfield's asking him "Who was his employer.") "That he was concerned for Count Haflang, and employed and paid by HIM."

Rex *versus* Ellen Taylor, late Bent.

SHE was brought up by *habeas corpus* from *Lancashire*; having been committed to the HOUSE OF CORRECTION at *Manchester*, for disobeying an order of two justices "Adjudging her child to be a bastard, and ordering her to maintain it, by paying 8*d.* a week for so long time as the child should be chargeable to the parish;" there to remain without bail or mainprize, except she shall put in sufficient surety "To perform the said order, or else &c," or be otherwise discharged by due course of law.

Unmarried women committed for disobedience to an order of bastardy, a subsequent marriage no cause for discharging her.

She was *unmarried* when the child was born; but was now married to Taylor.

Sir Fletcher Norton, (attorney general) Mr. Stowe, and Mr. Dunning, for the defendant, objected 1st. to the warrant of commitment; alledging, that the justices of the peace had no power, under 18 *Eliz. c. 3.* to make this order upon her, for her maintaining the child; she being then a married woman, and incapable of having any property: so that she could neither pay money nor give security. And the husband was in fact, incapable to pay it. Her being a married woman is apparent upon the return: and we have also proof of it, by affidavit.

To

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To prove "That a *feme-covert*, can not be charged," they cited *Foley's Cases of Laws relating to the Poor*, p. 56. in point: and they insisted that the husband ought to have been summoned to shew cause against this order.

2d. Objection. By 18 *Eliz. c. 3.* they are obliged to commit to the *common gaol*; and in that case, she would have been intitled to charities: whereas this commitment is "To the *house of correction*;" where there is *no* such benefit. And as this was a new act of parliament, they were obliged to pursue it literally. They mentioned a case of *Rex v. Boys* *; where it was determined "That upon a new act of parliament, they are confined to the method prescribed in it."

* P. 26 G. 2.
1753. B. R.

They said that the 6 G. 1. c. 19. § 2. does not extend to the present case. This is not a criminal, but a civil case. She has been *already* punished as a lewd woman. Therefore this case stands only on the 18 *Eliz.*

Contra, pro rege, Mr. Morton, Mr. Wedderburne, and Mr. Wallace, answered the objections.

1st. *Non constat* that she *was* a married woman: but admitting "That she was;" yet matrimony can *not* discharge a woman from either a crime or its penalty: the husband takes her under this incumbrance.

This is not like cases under 43 *Eliz.* For under *this* act, it is a *punishment*: *luat in corpore, si non habet in loculo*. But under the 53 *Eliz.* the *having ability* is essentially requisite to making any order grounded upon it.

In 11 *Rep. 61.*—Dr. *Foster's* case—it was determined, that a *feme covert* was within 1 *Eliz. c. 2. § 14.* and shall forfeit for not going to church. And in 2 *Strange 1120*, *Rex v. Crofts*, a *feme covert* may be convicted on 9 G. 2. c. 23. for selling gin.

2dly, The house of correction is *preferable* to the common gaol. Besides, this case is within the 6 G. 1. c. 19. § 2. which impowers the justices to commit vagrants and other criminal persons charged with *small* offences, *either* to the common gaol, or house of correction, as they shall think proper. For the act says * "And whereas vagrants and other criminals, offenders, and persons charged with small offences, are for such offences, or for want of sureties, to be committed to the county-gaol," it enacts that they may commit

* V. 6 G. 1.
c. 19. § 2.

commit such vagrants and *other* criminals, offenders, person and persons, *either* to the common gaol, or house of correction, as they in their judgment shall think proper. And this woman is within the words, "*other* offenders," and "*other* persons." This is a commitment for an *offence*; and is (in the words of the act of 18 Eliz. c. 3.) "Till she shall find such surety as aforesaid, or be otherwise discharged by due course of law." They cited *Rex v. Davis*, M. 28 G. 2. B. R. where an *indictment* was holden to lie against a parish-officer, for refusing to receive a pauper regularly removed to his parish: though it was objected, "That it was a *new* offence, so made by the act of 3, 4 W. & M. c. 11. § 10. which act gives a particular penalty; and that therefore it was not indictable." However this is one of the small offences mentioned in 6 G. 1. c. 19. § 2.

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TAYLOR.

Lord MANSFIELD—1st. A *feme-covert* is liable to be prosecuted for *crimes* committed by her. This woman has disobeyed the order of the justices: and the 18 Eliz. c. 3. prescribes the punishment here inflicted upon her. There is no need to summon the *husband*, in a *criminal* prosecution against the wife.

2dly. 'Tis within 6 G. 1. c. 19. § 2. she is committed for an offence; and for want of sureties. 'Tis therefore within the provision of that act, and a legal commitment: and it is better for her, than a commitment to the common gaol.

Mr. Justice WILMOT had no doubt about it.

1st. The 18th of Eliz. expressly considers the producing bastards, as an *offence*: not only the getting or bearing the child, but the leaving it to be a burthen on the parish, and defrauding the relief of the true poor of it. Therefore the justices may order a proper *punishment*; and also take order for the maintaining the child, in relief of the parish: they may do *either*, or *both*.

Matrimony does not purge the *crime*: she is still the object of the law, as to *criminal* jurisdiction. So was the case of the woman selling gin. There was no need to summon the *husband*. The husband is not liable for the *criminal* conduct of his wife.

* 2 Sir J. S.
1120.

2dly. And if it be a crime, she is a *criminal* offender within 6 G. 1. and may be committed to *either* prison, as the justices think proper. And it is for the ease, benefit and advantage of the party committed, to send her to the house of correction, rather than to the common gaol.

The

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TAYLOR.

The order mentioned by Mr. *Foley* was made upon a female covert "To keep her grandchild." But such orders made upon parents and children "Reciprocally to maintain each other," are not upon the foot of criminality; but to give a moral obligation a legal efficacy.

As to the conclusion of the commitment—The words of the act are pursued. The addition of—"And until discharged by due course of law;"—is only *nimia cautela*, and *non nocet*: it can not vitiate the former part of the order.

Mr. Justice YATES concurred.

1st. All offenses are *personal*: and no change of the offender's circumstances can discharge her. The husband was no object of this law: therefore there was no need to summon him.

2dly. It is good, within the 6 G. 1. though it had been bad under 18 Eliz.

Mr. Justice ASTON concurred likewise; and said, it was a clear case.

Per Cur. unanimously,

REMANDED.

Combe Esq; *versus* Pitt.

(1 Black. Rep.)

525. S. C.)

V. ante, p.

1586 to 1591.

Too late to object to plea-roll, after defendant has paid for issue.

THE defendant's counsel having moved for a new trial, pursuant to the liberty reserved for them, as is mentioned in pages 1586 and 1591; cause was now shewn, and allowed; and, consequently, the rule discharged.

The objection was to the *plea-roll*, which contained nothing but the declaration and the plea of *nil debet*: whereas there was a plea in *abatement*, which had been demurred to, but had never been deserted, nor any judgment upon it entered on the roll, before *nil debet* was pleaded, (as the counsel for the defendant alledged; and which the plaintiff ought not to have dropped, but ought to have entered it on the roll. This, they said, was an *irregularity* which would vitiate the whole: and the acceptance of the issue (in which this plea in abatement was omitted) could not cure it.

But

BUT THE COURT held this irregularity to be cured by the defendant's accepting the issue, and paying for it. His objection ought to have been made at that time: it is too late to make it now.

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COMB. V.
PITT.

RULE DISCHARGED.

Rex versus Wroughton Esq; and Others.

Friday, 3
May 1765.

ON shewing cause against an information for a misdemeanour, in obstructing divine service in the church, and grossly insulting the rector—*Pewsey* was the name of the church: and the rector's name was *Townsbend*. The particular circumstances were long and minute: enough of them will appear from what the court said. It is sufficient to hint, that Mr. *Townsbend* was a well-wisher to the *Methodists*; that he had admitted one of them into his pulpit; and that Mr. *Wroughton*, a justice of peace residing in his parish, disapproved of it, and strenuously opposed it.

Methodists and Dissenters have a right to the protection of the court, if disturbed in their decent and quiet devotions.

After hearing the affidavits and arguments of the counsel on both sides—

Lord MANSFIELD declared that he always understood "That a preacher must have a licence from the bishop of the diocese wherein he so preached;" and "That a licence from the bishop of a particular diocese would not give the person authority to preach in every diocese, nor in any other diocese." Indeed this is very seldom disputed: but if it be disputed, he took it to be in strictness so, by the canons.

In the present case, he thought the court should not interpose, upon the application of Mr. *Townsbend* (the rector;) because he had suppressed truth, and thereby misrepresented the case; and also for another reason, viz. that Mr. *Townsbend* was going out of the way of the general and usual course of celebrating divine service in the established church. Again, there was an inhibition, which had been obtained against Mr. *Townsbend* from the bishop of the diocese; who had commissioned Mr. *Wroughton* to see it complied with. Further, Mr. *Townsbend* himself behaved improperly, by particularly marking Mr. *Wroughton*, and preaching personally at him in his sermon. And it seemed to him, that the blow complained of was not a blow struck Mr. *Townsbend* by Mr. *Wroughton*, (as is charged upon him;) but an accidental brushing him with his finger.

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Rex v.
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and Others.

Therefore, there is no reason for the court to interpose in an extraordinary way, in this case as it is circumstanced.

Otherwise, I would have it understood, in general, that *Methodists* have a right to the protection of this court, if interrupted in their decent and quiet devotion: and so have *Dis-senters* from the established church likewise, if so disturbed.

Mr. Justice WILMOT was of the same opinion, for the same reasons. Here is a total suppression of truth and facts on Mr. Townshend's side, who makes this application: and upon the whole of the affidavits, I see no misbehaviour in Mr. Wroughton; and very great misbehaviour in Mr. Townshend. Mr. Wroughton applied to the bishop, attended him, and was directed by him to take care "That no *unlicensed* preacher should preach in the church of *Pewsey*:" and the bishop actually issued an inhibition; which Mr. Townshend defied and disobeyed. And the blow is sufficiently accounted for, as quite an accident, and not intended at all as a blow.

He added that he took the law about licences to be as Lord Mansfield had stated it: it must be a licence from the bishop of the diocese; (though in practice, it is not so used.) Strictly, the bishop of the diocese is to license all who preach in it.

Mr. Justice YATES concurred, for the same reasons: and added—"with costs;" because he had suppressed the truth.

Mr. Justice ASTON concurred with Mr. J. Yates; as the court would not have put Mr. Wroughton to the expence of defending himself against this rule, if the whole circumstances of the case had been disclosed.

Per Cur.—Let the Rule be discharged, with costs.

Oates, ex dimiss. Markham, versus Cooke.

(1 Black. Rep.
543. S. C.)

Tuesday, 7
May 1765.

Estate in fee
was held to pass
to a trustee, by
necessary impli-
cation of testa-
tor's intention,
without the
word heirs or
any other tech-
nical term.

THIS was an action of trespass and ejectment: to which the defendant pleaded the general issue.

It appeared in evidence, that GEORGE BEAUMONT being seised in fee of the tenements in question, five acres whereof were *copyhold* holden of the manor of *Wakefield*, and the rest were *freehold*, duly made his last will and testament in writing bearing date the 29th day of September 1762: (which will

was

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ex dimiss.
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COOKE.

was set out verbatim, in the case.) The substance of it was as follows. He gives several sums of 3 l. a year, to divers persons; some, for life; some, in fee: one of which annuities for life he expressly directs to be paid by his trustee or executor; and afterwards adds—"These legacies to be faithfully paid by my trustee *John Cooke*, every year and yearly, a month after *Martinmas*." He then gives several small legacies. He wills and desires, "That *William Frith* shall not be removed from his farm, upon any account whatsoever, during his natural life; he paying the same rent as usual: he leaving the farm, whoever come into it, to pay after the yearly rent of 9 l. And his decease the same." Then immediately follows—"I do also leave unto my trustee and executor, out of the yearly rents of the farm, 1l. 10s. a year, and yearly, for repairs and other uses of the farm." He afterwards leaves to his trustee and executor, 3 l. for sawing out the roughing; and 5 l. to build a tomb for him, in *Tankerly* church-yard: "He and his heirs always to see that it be kept in order." Then he gives several directions, and several more legacies. "And I do hereby constitute *JOHN COOKE* beforementioned, sole executor and trustee of this my last will and testament; he paying all my just debts, legacies and funeral charges." "Delivered by the aforesaid testator, to be his last will and testament in the presence of witnesses, surrendered according to law. *James Brookes. Edward Lloyd. Thomas Butler*." And further I desire that the bed with all the furniture thereunto belonging, standing in the closet, be left there, particularly for my trustee, that when he pleaseth to come over, he may lodge there without let, molestation, or hinderance."

After the making of the said will, to wit, on the 8th day of April 1761, the said *George Beaumont* surrendered the said copyhold tenements to the use of his will; and afterwards died seised of the said premises, respectively, in manner aforesaid; leaving *John Smith, John Parkin, Thomas Beaumont*, and the lessor of the plaintiff, his nephews and co-heirs at law.

The question was, "Whether any estate, and what, passed to *JOHN COOKE* the trustee."

Mr. Walker argued for the plaintiff: *Mr. Fenton*, for the defendant.

On behalf of the plaintiff, the heir at law, it was urged, that there was nothing to disinherit him: and the intention of the testator is uncertain.

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OATES
ex dimiss.
MARKHAM v.
COOKE.

On the contrary, for the trustee, it was insisted, that he took a legal estate; and therefore the heir was barred. And to prove "That he took a fee, by necessary implication," the cases of *Shaw v. Weigh*, 2 Strange 798. *Willis v. Lucas*, 1 Peere Williams 472. *Collier's case*, 6 Co. 16. and *Ackland v. Ackland*, 2 Vern. 687. were cited and relied on.

THE COURT were all clear, "That both the freehold and "copyhold passed to *John Cooke*, the trustee, in fee."

Lord MANSFIELD declared, he had not a particle of a doubt. The intention is to be collected from all the parts of the will: and it must be clear; or else the heir at law shall not be disinherited. But here, the testator's intention is most clear, "That he meant to devise his real estate, in trust."

Mr. Justice WILMOT concurred. *Cooke*, the trustee, took the legal estate, by this devise. The intention of the testator is to be collected from all the parts of the will taken together: and if it be thereupon necessary to imply it, 'tis the same thing as if it was particularly expressed. Now here are trusts to be executed, which the trustee could not execute and effectuate, without having an estate in fee devised to him. No particular technical terms are requisite: 'tis sufficient, if the implication be strong, violent, and necessary. And here it is so: (which he shewed, at large.)

Mr. Justice YATES was likewise of the same opinion; and held that the implication here was clear, plain, and necessary. The estate must be coextensive with the charges: and here are annuities charged upon the real estate, and devised in fee. Therefore a legal estate was certainly intended to be devised to the trustee.

Mr. Justice ASTON concurred; declaring it to be a clear case in his opinion.

Per Cur.—unanimously,

JUDGMENT of NONSUIT.

Bright

Bright *versus* Purrier.

1765.

Tuesday, 14
May 1765.Affidavit of
debt, as appears
by bill of ex-
change, not suf-
ficient to hold
to special bail.

THIS was an action brought upon a foreign bill of exchange, payable at the distance of 120 days. The bill was refused to be accepted. The assignee thereupon brought this action against the drawer, *within* the 120 days: who put in bail to the action.

Sir *Fletcher Norton* and Mr. *Walker* moved, on *Thursday* last, on behalf of the defendant, to set aside the plaintiff's proceedings, for irregularity, insisting, that this action was brought *prematurely*: for, it must be presumed, they said, that there was, at the time the bill was drawn, a *consideration* given for the *forbearance* of payment for the 120 days.

But THE COURT had great doubt about this: they were not satisfied that the plaintiff's right remained suspended for 120 days.

Whereupon the counsel for the defendant turned their motion, "That the defendant should be discharged on common bail," upon the insufficiency of the *affidavit* made by the plaintiff in order to hold him to bail: (which affidavit was only by way of reference, "*As appears by a bill of exchange*" &c.)

A RULE was then made to shew cause: which rule was now made ABSOLUTE.

Rex *versus* Samuel Dixon.Wednesday, 15
May 1765.

A *Subpœna* out of the crown-office had been served upon Mr. *Samuel Dixon*, an attorney, with a *duces tecum* of certain papers hereafter mentioned; to give evidence before the grand jury of the county of *Northampton*, at the last assizes there; and to produce three vouchers which had been produced and insisted upon by one Mr. *Peach*, Mr. *Dixon's* client, before a master in chancery: and this *subpœna* with the *duces tecum* was in order to found a prosecution by way of indictment against *Peach* (who had produced these vouchers before the master,) for *forgery*. Mr. *Dixon* did not appear before the grand jury, in obedience to this *subpœna*. Whereupon,

Attorney at law
not obliged to
obey a *subpœna*
with a *duces*
tecum, in order
to give evidence
of a charge of
forgery on his
client.

1765. On Monday the 6th instant, Mr. *Wallace* moved on behalf of the prosecutor, for an attachment against him, for refusing to appear; and had a rule to shew cause.

REX V. DIXON.

Mr. *Caldecott* now shewed cause. He insisted that Mr. *Dixon* could give no other evidence, but of what had been communicated to him by his client, IN CONFIDENCE: and therefore he was not compellable to produce these papers against his client, in order to prove him guilty of a forgery.

Lord MANSFIELD was clearly of this opinion: and that Mr. *Dixon*, instead of producing them against his client, ought to have, immediately upon receiving the *subpœna*, delivered them up to his client.

Mr. Justice WILMOT concurred that he ought not to have produced them against his client.

Mr. Justice YATES was of the same opinion; and thought the rule ought to be discharged with costs.

RULE discharged, with COSTS.

N. B. These were not papers that had been detained or impounded by the court of chancery; but remained in Mr. *Dixon*'s hands, as papers belonging to his client *Peach*, who had produced them as vouchers to his account, and which were afterwards returned to Mr. *Dixon* as his solicitor.

Surman versus Shelleto.

MR. *Harvey* made a motion for full costs; though the jury had found only 1 s. damages. They had given 40 s. costs.

6 V. 21 J. 1.
c. 16. (As to
22, 23 C. 2.
c. 9 § 149.
V. ante, p.
1282, 1283,
1284.

In action for words, if they be in themselves actionable, and less damages than forty shillings, not full costs, unless colloquium and special damage laid.

It was an action for * words; and there was a colloquium laid about the plaintiff's trade; and also a special damage laid, of his having lost his business by reason of the speaking of the words. The words in question were contained in the 3d. count; on which 3d. count, the verdict was taken: and they were these—"Thou art a rogue; and thou hast cheated me of several pounds."

The

The rule, he said, was "That where the words are *not* actionable in themselves, there shall be full costs, if special damages are laid; *though* the damages found be under 40*s*." And to shew, that these words are *not* in themselves actionable, he cited *Hardr. 8. Wake v. Chapman et Ux.* and 5 *Mod.* 398. *Savage v. Robury*.

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SERMAN V.
SHELLITO.

Indeed, if the words spoken are in themselves actionable, and less damages found than 40*s*. there shall *not* be full costs; except there be a colloquium, and special damages laid, as a substantive and independant injury.*

But THE COURT held the latter words, "*Thou hast cheated me of several pounds*" to be actionable; and told Mr. Harvey, he must be content with his 40*s*. costs.

* See Mr. Serjeant Sayer's Law of Costs, Ch. 3. (p. 20 to 28.) and the cases there cited and discussed.

MOTION DENIED.

Butterworth and Barker *versus* Walker and Waterhouse.

SIR Fletcher Norton and Mr. Lee shewed cause against a prohibition to stop the prerogative court of York from proceeding to grant a faculty for an organ in the church of *Halifax*.

Prohibition shall not be granted, where it is not material.

The cause below was for obtaining a faculty for it: and there was a citation of the parishioners and inhabitants, to appear, and to "Shew cause why an organ should not be erected in their parish-church." They did so: and their objection was, "That the plaintiffs below had not the consent of the parish." The answer was—"But we have the consent of the church-wardens: and there is also so large a subscription for erecting and maintaining it, that it will never be chargeable to the parish." And they also alledge the consent of a select meeting or vestry. The other side deny that the parish in general is bound by the consent of this select meeting or vestry. Whereupon the applicants for the faculty alledge, "That for 20, 30, or 40 years, it has been usual to collect the sense and consent of the parishioners about all parochial matters, at such select meetings or vestries; and that the whole parish are, and for all the time allegate have been bound by the acts and consent of such select meetings or vestries.

Upon which, these parishioners who opposed the organ moved for a prohibition.

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BUTTER-
WORTH and
Another v.
WALKER and
Another.

The counsel who now shewed cause against it, not only contended, that the consent of the *parish* is not necessary; but also insisted that there is no ground shewn for a prohibition. For the applicants for the faculty *only* alledge, "That for 20, 30, or 40 years, it has been usual to collect the sence and consent of the parishioners to all parochial matters &c;" and that "At one of these meetings, &c. &c;" and "That for ALL the TIME ALLEGATE, it has been usual &c." So that here is *no custom* in issue; nor any thing that the ecclesiastical court *can not* try: it is only alledged, that "For 20, 30, or 40 years, it has been usual, thus to collect the sence of the parish." But here is no allegation of any *immemorial* common-law-custom: and therefore the ecclesiastical court may proceed. 2 Ro. Abr. 286. pl. 42, 43. Latch. 210. Clark v. Prowse. A custom alledged in a libel, and denied by the defendant in the ecclesiastical court, may be there decreed against. The case between the church-wardens and the rector of *Market-Bosworth*, in 1 Ld. Raym. 435. was so: and a prohibition was refused, after that sentence. That case gives the true reason of this court's issuing prohibitions to the spiritual court to inhibit them from trying customs; namely, "Because they have *different notions* of customs, as to the *time* which *creates* them, from those that the common law hath. For, in some cases, the usage of ten years; in some, twenty; in some, 30 years; make a custom in the spiritual court: whereas by the common law, it must be time whereof &c. which reason failed in that case; because they had there adjudged "That there was *no* such custom allowed by their law, which allows a less time than the common law does, to make a *custom*."

THE COURT observed, that the very ground of applying for the faculty, is, "That the parish are *not* to be burthened with the expence of this organ:" the very condition of praying it is, "That it is to be *maintained by a subscription*."

Mr. Wedderburne, who was for the prohibition, said that no matter of splendor or ornament in the church can be done *without the consent of the parish*.

Mr. Justice WILMOT asked him what authority he had for this position. He said, *he* knew no such doctrine.

Mr. WEDDERBURNE did not specify any particular authority for it; but went on to say that this court will not suffer the ecclesiastical court to proceed upon *temporal rights*: and here is a *temporal right* in the *parish*. Therefore, "Whether
" it

"it be laid as a custom, or not," is immaterial: the question is, "Whether a *temporal right* does not intervene." The parish can not be bound by the majority of a meeting of their representatives, or by their church-wardens.

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BUTTER-
WORTH and
Another v.
WALKER and
Another.

Mr. *Wallace*, on the same side, observed, that if the ecclesiastical courts allow the evidence of 10, 20, 30, or 40 years to be a proof of a custom, the alledging a usage for such a time only, without alledging it to be immemorially, would be only an artifice to *elude* prohibitions to hinder them from trying immemorial customs. And if ornaments can be *imposed* upon the parish by the ordinary, without the consent of the parish, the parish will be bound to *maintain* them. He insisted that the ecclesiastical court have no such power as that of imposing them without the consent of the parish: and we deny any such consent; or any usage for the parish to be bound by such a meeting as this was.

Lord MANSFIELD—(directing his discourse to Mr. *Wedderburne* and Mr. *Wallace*) repeated the case. The ecclesiastical court issue a citation for the parishioners and inhabitants to appear and shew cause why this organ should not be erected in their church. They do appear. It appears to be applied for, upon a *subscription*; and a *consent by a select meeting* is alledged: but it is denied "That the parish are bound by such select meeting." Then it is alledged, that for 20, 30, or 40 years, it has been the usage "That the parish in general are bound by such a select meeting." Upon this, you apply for a prohibition.

But his Lordship did not, at present, declare any opinion.

Mr. Justice WILMOT thought they were proceeding below, upon a *mistake*. The citation must be intended to have been issued, for the parishioners to shew "Whether they have any *temporal rights* that will be *injured* by setting up an organ." But the *consent* of the whole parish can not be essentially necessary to the ordinary's setting up an organ: nor would the parish be bound to repair it, when set up.

Now if the consent of the parish is *not* necessary, then all these proceedings below are *nugatory*. It seems as if they did think such consent to be necessary: and I own, that *if the consent of the parish were necessary*, I should think the prohibition ought to go; because the consent of the *vestry* can not bind the *whole parish*, without immemorial usage.

Mr.

1765.

BUTTER-
WORTH and
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WALKER and
Another.

Mr. Justice YATES also thought that a prohibition ought to go, *if* there were any temporal right to be determined. For a usage of 30 or 40 years is not sufficient: it can be no valid custom, unless it has been used *time out of mind*.

This suit, he said, below, seems to me to be totally *nugatory*.

Parishioners can not be *charged* with *new* ornaments, without their consent, as well as that of the ordinary. The citation might be intended only to prevent injury being done to the property of their private seats in the church.

Both sides here seem to have thought the consent of the parish necessary; which it is *not*.

Mr. Justice ASHUR—If proper trial of the custom is eluded by alledging a usage of 40, 30, or 20 years, I should think Mr. *Wallace's* observation to be right.

The parish may be used to meet and consider of necessary repairs: but they can not preclude the ecclesiastical court from ordering an organ, or any thing else within their cognizance.

This organ is stated to be provided by *voluntary contribution*. The citation was issued in order to receive reasons against injuries that might happen to the private property of the parishioners.

But the ecclesiastical court does not encroach upon or interrupt the meetings of the church-wardens about such things as belong to *them*; nor draw the cognizance of them to a different *forum*.

Lord MANSFIELD—The ground we go upon is "That a prohibition *will not be material*."

RULE DISCHARGED.

(1 Black. Rep.
555. S. C.)

Friday, 17
May 1765.

Lord Chief Justice Pratt came personally into the court of king's bench, pursuant to a writ, to acknowledge his seal to a bill of exceptions.

Money, Watson, and Blackmore, *versus* Dryden Leach: (in Error.)

SOON after the court sat, the Lord Chief Justice PRATT came *personally* into court, to confess (*ore tenus*) his *seal* put to a *bill of exceptions* in this case; pursuant to the requisition of the following writ, *viz.*

"GEORGE

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MONEY and
Others v.
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“GEORGE the Third &c.—To our trusty and well-beloved *Charles Pratt* knight, our chief justice of the bench, greeting.—Whereas we have lately been informed that in the record and process and also in giving of judgment in a plaint which was in our court before you and your associates, our justices of the said bench, by our writ, between *Dryden Leach*, and *John Money*, *James Watson*, and *Robert Blackmore*, in a plea of trespass, assault, and imprisonment, manifest error hath intervened, to the great damage of the said *John James* and *Robert*; which said record and process, for the error aforesaid, we have caused to be brought into our court before us; and now, on the behalf of the said *John James* and *Robert*, we are informed, in our said court before us, that at the trial of the issue first joined between the said parties in the plea aforesaid, the counsel learned in the law of the said *John James* and *Robert* alledged on their behalf certain exceptions to the opinion then declared and given by you; and that the said exceptions were then and there written in a certain bill, to which you put your seal, at the request of the said *John James* and *Robert*, according to the form of the statute in such case made and provided; and the said *John James* and *Robert* have brought into our court before us the said bill with your seal put to the same, as it is said; whereupon the said *John James* and *Robert* have besought us to do what further should seem meet to be done in this behalf, according to the form of the said statute; and forasmuch as by the said statute it is ordained, that in such case the justice whose seal should be put to such exception be commanded to appear before us at a certain day, to confess or deny his seal: therefore we command you that you personally appear before us, on the morrow of the ascension of our Lord, wheresoever we shall then be in *England*, to confess or deny the seal so put to the said bill of exceptions as aforesaid to be your seal, according to the form and effect of the said statute; and that you bring with you, at the same time, this writ. Witness *William Lord Mansfield*, at *Westminster*, the 24th day of *April* in the fifth year of our reign.”

N. B. The bill of exceptions, sealed by Lord Chief Justice *Pratt*, had been previously brought into this court, and was now in the hands of Mr. *Owen*, as secondary of the office of pleas: and all the proceedings, down to and including the abovementioned writ, were entered upon the rolls of this court.

The Lord Chief Justice *PRATT* being now come into this court, pursuant to the command contained in the said writ, delivered

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MONEY and
Others v.
LEACH.

delivered it to the lord chief justice of this court; Mr. Owen, at the same time, delivering the *original bill of exceptions* into Lord Mansfield's hand. Whereupon Lord Mansfield, shewing to Lord Chief Justice Pratt the seal thereto affixed, asked him "Whether that was his lordship's seal, or not." To which question, his lordship answering in the affirmative, Lord Mansfield redelivered the bill of exceptions to Mr. Owen; at the same time delivering to him the abovementioned writ, with orders "That it should be filed."

Note—There was *no written return* to this writ: but Mr. Owen proposes to indorse upon it—"Sir Charles Pratt Knight, the Chief Justice within named, personally appeared in the court of the lord the king before the king himself &c, on the day of the return within written; and confesseth that the seal put to the bill of exceptions within mentioned is his seal."

The Lord Chief Justice of the *common pleas* immediately retired without sitting down: and the Lord Chief Justice of this court attended him till he was got past the puisné judge, but not quite to the door of the court.

Saturday, 18
May 1765.

Rex versus the Inhabitants of Burton Bradstock.

This Case is already printed and published, in the Quarto Edition of my SETTLEMENT-CASES, No. 171. P. 531. See it abridged, in the Table.

Monday, 20
May 1765.

Rex versus Righton Esq.

Not to pay costs for not going to trial according to notice, if not occasioned by the party's own default.

MR. COXE shewed cause, on the part of the defendant, why his client should not pay the prosecutor his *costs* by him expended in this cause, for the defendant's *not going to trial*, in pursuance of his notice given for that purpose.

It was an indictment for refusing to take upon himself the office of Burtholder: which indictment the defendant had removed by *certiorari*; and thereupon had (of course) entered into recognizance "To appear, plead, and *try* it at the next *affizes*." The defendant had obtained a rule for a special jury; and every thing was ready for trial: but *only five* of the special

special jury appeared; and *neither* side prayed a *tales*; (though the defendant had a *warrant* for a *tales* in his pocket.)

1765.

Rex v.
Rigton.

The question was, "Whether, upon these circumstances, the defendant was obliged to pay costs for *not* going on to trial."

Mr. *Filmer*, for the prosecutor, urged very strongly, "That he was obliged to pay them."

Mr. *Coxe* argued, on the contrary, that the defendant had been guilty of *no default*; and that the *prosecutor* might have prayed a *tales*, if he had thought fit.

Mr. *Filmer* replied, that they were not provided with a *warrant* for a *tales*; because it was incumbent on the *defendant*, to go on to trial: and *he* had actually a *warrant* in his pocket, but *would not use it*.

THE COURT were unanimously of opinion, that the defendant had *not* been guilty of such a default as could render him liable to pay costs for not going on to trial: the *prosecutor* might have come prepared with a *warrant for a tales*, if he had thought proper.

RULE DISCHARGED.

The End of Easter Term 1765. 5 G. 3.

Trinity Term.

5 Geo. 3. B. R. 1765.

Friday, 7
June 1765.

Jury's representations in favour of a criminal, after conviction, censured.

Rex versus Edmund Thirkell.

HE had been convicted of an assault upon *Mary Amelia Halfpenny*, an infant under ten and upwards of five years of age, with intent to ravish her.

Eight of the jury signed a paper in his favour; intimating their *disapprobation* of the verdict, which they themselves had given.

On *Tuesday* the 7th of *May* last, he was brought up and committed.

LORD MANSFIELD then expressed great dislike of such representations made by jurymen, *after* the time of delivering their verdict. It might be of very bad consequence, to listen to such *subsequent* representations contrary to what they had before found upon their oaths; and which might be obtained by improper applications subsequently made to them.

Mr. Justice WILMOT also expressed the same dislike of such subsequent representations made by jurymen *after* their departure from the bar; and thought they ought to be totally disregarded.

Upon LORD MANSFIELD's report, it appeared that the child had also received the foul distemper from him.

He was, at that time, only committed to the custody of the marshal.

Mr.

Mr. Justice WILMOT now pronounced the judgment of the court upon him; viz.

1765.

REX v.
THIRKELL

To be set in and upon the pillory at *Charing-Cross*, for an hour, between the hours of twelve and two; to be imprisoned one year; to find security (himself in 100 l. and his sureties each in 50 l.) for his good behaviour for three years; and to pay a fine of 6 s. 8 d.

Rex versus Osborn.

Monday, 10
June 1765.

MR. Morton shewed cause against quashing an indictment for selling, as two chaldron of coals, a quantity defective by so many bushels (in the indictment specified) of that quantity which a bushel ought by law to contain.

Indictment for selling, as two chaldron of coals, a less quantity, quashed on motion.

He argued, that this is tantamount to an indictment for selling by *false measure*; and distinguished the present case from those of 1 Sir J. S. 497. *Rex v. Gibbs*, 1 *Ld. Raym.* 442. *Rex v. Flint*, and 2 *Salk.* 687. S. C.

It is no objection to an indictment, to say "That a civil action might have been brought:" for, the person injured may take either method.

The case of *Rex v. Marks* in 1 *Ld. Raym.* 702. was an indictment for the unlawful taking, *vi et armis*, so much money (ten pounds) in *pecuniis numeratis*, of J. S. Mr. Eyre moved to quash it, because an action lies: *sed non allocatur*.

Therefore the court will not quash it on motion.

Lord MANSFIELD—A man may be indicted for selling by *false measure*: but this is not so charged. * If it had been charged, "That he sold by *false measure*; by a bushel which contained but so much whereas the legal bushel ought to contain so much;" it had been another thing.

* See the cases, in point, of *Rex v. Wheatley*, ante vol. 2. p. 1125 to 1131. and *Rex v.*

Mr. Justice WILMOT and Mr. Justice YATES both concurred. The latter said, it was only a declaration turned into an indictment. The former mentioned *Rex v. Lewis*, p. 1755. 28 G. 2. in this court; which was an indictment for selling as gum-senega, what was not gum-senega; and that judgment was arrested: which was a very strong case, he said.

Danage, 1130. and *Rex v. Driffeld*, and *Rex v. Combrune*, and other cases there cited.

[Many

1698

Trinity Term 5 Geo. 3. B. R.

1705

Rex v.
Gibbs.

[Many cases in point were there cited by Mr. Serjeant Hewitt: and on Friday 9th May 1755, his rule "To arrest the judgment," was made absolute, without opposition.]

Lord MANSFIELD—If there be no doubt of this indictment being bad, it is better for the prosecutor, to quash it on motion. And I take it, that it ought to be expressly charged, "That the defendant sold them by false measure:" whereas here, it is not expressly charged, but only left to be collected by implication.

Mr. Justice ASTON thought that this selling short measure instead of full measure was worthy the attention of the legislature; although it might not be indictable at common law, unless charged to be by false measure. He agreed, that this indictment has not the proper averments.

Mr. Justice WILMOT—The reason why this is not indictable, is, because it is in every body's power, to prevent this sort of imposition: whereas a false measure is a general imposition upon the public, which can not be well discovered. Yet he concurred with Mr. Justice ASTON, that this is an inconvenience which very much requires a remedy.

Per Cur. unanimously,

INDICTMENT QUASHED.

Rex versus Eudem.

THIS was the same point as the last: and therefore the same rule was made.

INDICTMENT QUASHED.

Rex versus John Storr.

Indictment will not lie for a mere civil injury.

ON the last day of last Hilary term, Mr. Serjeant Hewitt moved to quash four indictments, being (as he said) for private injuries only; though laid "vi et armis:" and he had a rule to shew cause.

Mr. Attorney General now shewed cause why these four indictments (which he said were for forcible entries and detainers) should not be quashed.

The first was for unlawfully entering his yard, and digging the ground, and erecting a shed; and unlawfully and with force and arms putting out and expelling one Mr. Sweet the owner, from the possession, and keeping him out of the possession of it.

1765.

REX V.
STONE.

It was objected, "That this is only an action of trespass converted into an indictment."

But this is charged as an *unlawful entry*, with *force and arms*, upon the *possession* of Mr. Sweet.

There is no other difference between this case and * *Rex v. Bathurst and Others*, Trinity term 1755, but that *that* was an entry with force and arms into a dwelling-house or a school-house with the appurtenances: *this*, into a yard and shed.

* In Easter term 1755. 23 G. 2. The court refused to quash that indictment, upon motion: and in Trinity following, they gave judgment for the king, upon demurrer.

An entry *with force and arms*, *unlawfully*, upon the *possession* of another, and putting him out of possession, is an indictable offence; even though the person so entering has a right. And the court can not, before trial, say "That it was *not* with force and arms": *that* must depend upon the evidence.

Therefore the court will not quash these indictments, on motion.

N. B. There was *no other* charge of violence, in the present case, besides the common technical term of *vi et armis*.

Mr. Justice WILMOT—In four of the counts in *Rex v. Bathurst et al.* "*Manu forti*" (which was in the first) was omitted: and it was holden, "That *any* sort of force sufficient to support it might have been given in evidence, by virtue of the words *vi et armis*; though if *no* such evidence should be given upon the trial, the defendant ought to be acquitted."

Mr. Justice ASTON mentioned, that he took Mr. Justice DENISON to have said, that "*Vi et armis* was *prima facie*, as good as *manu forti*." §

§ According to my own note,

his words were—"This is laid to be with force and arms: and the degree of the force must depend upon evidence."

Mr. Serjeant Hewitt and Mr. Caldecott, *contra*, argued in support of the motion.

1765.

REX V.
STORR.

They took notice, that three of these indictments differ from the fourth: the first is for erecting a shed &c; the 2d for erecting, &c; the 3d for cutting a bellfry, (which in *Lincolnsbire* means a stable:) the 4th. (which they did not object to,) for entering &c, a *dwelling-house*; and *vi et armis* and with *strong hand*, &c.

They insisted that the offence charged in each of the former three, respectively, was a *private injury*; and does *not at all* concern the king or the public; and therefore was not indictable. To prove this, they cited 2 *Hawk. P. C. c. 25. p. 210.* And *Rex v. Thomlinson, Tr. 9 G. 1.* for entering a close, was quashed.

The case of *Rex v. Bathurst*, they said, was, upon the face of it, an indictment for a *forcible entry*, and *not* for a *common trespass*. It was a stronger case than this: *that* was against *three* persons, who were enow to make a riot; *this* is only against a *single* person: *that* was for entering a *dwelling-house*, and putting him out of possession; *this* is only entering a yard, digging the soil, and erecting a shed.

There are many cases prior to that of *Rex v. Bathurst*: *Hil. 11 G. 2. Rex v. Archer*; *Pass. 22 G. 2. Rex v. Gask*; *Rex v. Hide*, and *Rex v. Hide and another, Tr. 22 and 23 G. 2.**

* N. B. The three last rules were made absolute without defence. *Rex v. Rawson, Tr. 1749. 22 and 23 G. 2. S. P.* but the rule was enlarged.

The *converting* an action of trespass into an indictment is attended with great inconvenience: it makes the plaintiff a *witness for himself*; and *saves costs*.

Mr. Attorney General, in reply—Let them *demur*; that the point may be settled.

The case of *Rex v. Bathurst* must govern the present case. And in that case it is settled, “That *any* degree of force and “violence sufficient to support an indictment may be given “*in evidence* under the *vi et armis*.” which contradicts the principle laid down by the other side.

Every battery, every breach of the peace is indictable. The party injured has his *election* to bring an action, or to indict. *Every trespass* too is indictable, if it comes out upon the trial, to be an offence against the king and the public.

Rex v. Bathurst, was only *vi et armis*; and *vi et armis* is, and was there holden to be, equipollent to “*with a strong hand*.”

It

It is said, that in that case, there were three defendants; here, only one. But *one* man may commit a breach of the peace; though not a riot: he might be armed with *pistols*, for aught that appears to the contrary; and this might be, possibly, *proved*.

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Rex v.
Storr.

There is no distinction between a school-house, or even a dwelling-house, and a yard or a stable.

After that solemn resolution in the case of *Rex v. Bathurst*, an indictment of this sort ought not to be quashed in a summary manner, on *motion*.

LORD MANSFIELD—The objection to the fourth indictment is given up. The other three stand, all of them, upon the same ground. Nothing but the *vi et armis* implies force. Every force and violence is a breach of the peace.

The case of *Rex v. Bathurst* does not seem to me to lay down any such rule as "That *vi et armis* alone implies such a force as will, of itself, support an indictment." There, the fact itself naturally implied force: it was turning and keeping the man out of his dwelling-house; and done by three people. Three of the judges lay a stress upon that circumstance, of its being an entry into a *dwelling-house*: and the parties who framed the indictment plainly had a view to indict for a forcible entry.

As at present advised, I should think the present case within those that justify the quashing.

Coming with a *pistol*, though possible, is not to be supposed.

If there be no doubt upon it, there is no reason to put the defendant to more expence.

Mr. Justice WILMOT thought that it ought to appear to be an indictable offence: for otherwise, in cases where there was no malice, the defendant might be put to a great expence without remedy or satisfaction.

The cases cited shew, "That such indictments have been quashed:" and that of *Rex v. Bathurst* being an entry into a dwelling-house makes that case no authority in this.

1705.

REX v.
STOKER.

But *this* case stands indifferent, "Whether the offence is indictable or not:" whereas it ought to *appear upon the face* of the indictment "That it is indictable."

Therefore he was for quashing these three indictments.

Mr. Justice YATES concurred. *Rex v. Bathurst* was determined upon a right principle: but *there*, the nature of the offence *appeared*; and evidence might be given to *show* the offence to be indictable. It was a *forcible entry* into a man's *private dwelling-house*, by three people.

But in *ordinary common* cases laid *vi et armis*, we are not to *suppose* and *presume* swords and pistols, or any thing criminal and indictable, unless it be charged. Here is no outrage or violence *charged* or *probable*.

Therefore he was for quashing.

Mr. Justice ASTON likewise concurred. A man can not be indicted for a *bare* trespass. In a case of *Rex v. Jopson and five others*, P. 25 G. 2. B. R. All the cases of this sort were cited: and the court refused to quash it on motion. The distinction there taken was, "That there were *numbers* of persons unlawfully assembled, and *actual force* charged;" and *therefore* that indictment was not quashed.

* It was an indictment

against JOHN JOPSON and *five others* therein named, charging that they and several other persons to the jurors unknown, *unlawfully assembled*, to *disturb the peace of the King*; and, being so assembled, the six defendants particularly named, with *force and arms*, at &c. the mine of black lead of J. B. and J. S. esquires, did *unlawfully break and enter*, and 60 pounds weight of black lead &c. of the goods and chattels of the said J. B. and J. S. did *unlawfully take and carry away*; against the peace &c.

Mr. Clayton moved to quash it; for that no indictment would lie; it being only a trespass, for which an *action* of trespass or trover might and ought to have been brought: and he cited several instances where indictments had been very lately quashed, because the matter was merely actionable. Many of these have been already mentioned: others were *Rex v. Birkhead*, M. 11 G. 2. *Rex v. Newball* (qu. when,) *Rex v. Archer*; *Rex v. Mason*; both in Hil. & Pas. 11 G. 2. (but both were without defence.) *Rex v. Jackson*, M. 12 G. 2. *Rex v. Heaton et al.* Tr. 13 G. 2. (quashed without defence.) *Rex v. Camage*, H. 14 G. 2. *Rex v. Coates*, H. 14 G. 2. and *Rex v. Bateman*, the same term.

THE COURT thought it to be such a sort of offence, that they ought not to quash the indictment upon *motion*: the defendants might *demur*, if they thought proper. And they were unanimous in discharging the rule.

In *Rex v. Bathurst*, the *ruling reason* was "That it was a *dwelling-house*:" and there would have been no occasion to have recourse to that reasoning, *if vi et armis* alone had been sufficient. The degree of force ought to appear upon the indictment.

If it was a matter of *property*, it ought to be *civilly* tried : as was done in a case of *Rex v. Wightwick*, temp. Lord Hardwicke. So in another, of *Rex v. Fry*—(tried by the name of *Fry and Wood*—) for pulling down a house at *Tunbridge-Wells*.

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REX V.
STORR.

Therefore I think the three indictments which have been objected to, ought to be quashed.

Lord MANSFIELD—Let the three indictments be quashed ; and the rule be DISCHARGED, as to the other.

See S. P. determined accordingly, post p. 1706. *Rex v. Atkins*, the very next day after this ; and *Rex v. Gillet*, on the same day ; and pa. 1731. *Rex v. Bake and fifteen others*, on the last day of this term, 26th June 1765.

Goodright, ex dimiss. Tyrrel, vid. *versus* Mead and Shilson.

Tuesday, 12
June 1765.

THIS was a special case in ejectment, from the last *Lent* assizes for the county of *Devon*. It was tried before Mr. Serjeant *Burland* : and a verdict was found for the plaintiff, subject to the opinion of this court, on the following case.

Tenant in tail may by lease and release, or by bargain and sale, pass a base fee ; a defeazible estate to the releasee or bargainee, voidable by the issue in tail.

CASE—*John Shilson*, the father of the defendant *Nicholas Shilson*, being seised to him and the heirs male of his body, of the premises in question, the remainder to his own right heirs, by lease and release dated 24th and 25th October 1742, previous to his marriage with *Susannah Smerdon*, conveyed the same to trustees, to the use of himself for life ; remainder, to the trustees to preserve contingent remainders ; remainder, to the use of the said *Susannah*, for her life ; remainder to his first and other sons by the said *Susannah*, in tail male.

The marriage took effect ; and they had issue *Nicholas Shilson* the defendant their only son.

In *Trinity* term 1761, the said *John Shilson* suffered a common recovery ; and by deed dated 24th June 1761, he declared the uses of the said recovery to be, to — *Lucas* his heirs and assigns ; in trust to sell the said premises, and out of the money arising therefrom to pay and discharge certain debts mentioned in the said deed ; and to pay the residue of

1704

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ex dimiss
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MEAD and
Another.

the purchase money, or reconvey such parts of the premises as should remain unfold, to the said *John Shilfen* his heirs or assigns.

The said — *Lucas*, by lease and release dated 27th and 28th October 1763, in pursuance of the trusts of the said deed last mentioned; conveyed the said premises to *Elizabeth Tyrrell*, the lessor of the plaintiff, and her heirs.

The said *John* and *Susannah Shilfen* are both dead.

The question is, "Whether, upon the facts stated, the plaintiff is intitled to recover the said premises."

Mr. Gould, for the lessor of the plaintiff, insisted that the purchaser took a good title under this recovery.

1st. The law does not suffer an estate limited by a tenant in tail, to commence after his death, to take effect.

2dly. The limitations under the settlement in 1742, are ineffectual, wrongful and void.

3dly. If the uses are void in their creation, they cannot be made good by the common recovery.

First—In proof of the first position, he cited *Cro. Jac.* and *Lane*; and *Cro. Eliz.* 279, *Blitheman v. Blitheman*; and *Moore* 683, *Freshwater v. Rois*; and *Yelverton* 51. S. C.

Second point—It is not yet well settled, "What estate the releasee or bargainee of a tenant in tail takes." See 10 Co. 95, *b. Edward Seymour's* case.

But these limitations are wrongful and void, in point of form as well as in substance. The tenant in tail having taken back the estate to himself, he can do no more. All further uses are utterly void.

As to the manner of operation by uses—He cited *Yelv.* 51, *Freshwater v. Rois*, and *Cro. Eliz.* 279. *Blitheman v. Blitheman*; *Bro. Feoffments at Uses* p. 29. and *Sheppard's Touchstone of Common Assurances* 509, which, he said, was in point to the present proposition.

Indeed there is a dictum in *Machil v. Clark*, which is contrary to this.* But it is not law; nor is it at all mentioned in several other reporters of the same case.

* V. 2 Salk.
619. pl. 1.

He

He admitted that by the release, a defeasible estate passes to the releasee : but denied that the tenant in tail can limit to himself a use for life, *to commence after this limitation.*

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ex dimiss.

TYRRELL v.
MEAD and
Another.

The doctrine cited from *Sheppard's Touchstone* is in point : for the present case is a *remainder* ; which lies in grant, as much as an *advowson* does.

Third point—If the uses are void in their *creation*, a common recovery cannot make them good : as appears by the case in *Gro. Eliz.* 895, *Bedingfield's* case and that of *Machil v. Clark*, before mentioned.

He concluded that the common recovery conveyed a good title to the purchaser.

Mr. Justice WILMOT—It is now fully settled, "That a release or bargain and sale by a tenant in tail, will convey a *base fee*, a *defeasible* estate, to the releasee or bargainee : " though it must be allowed, that the *old* notion was, and even in Lord Coke's time, " That a tenant in tail could *not* convey an estate *longer* than for his own life." But that notion is now over-ruled ; and the contrary, settled.

LORD MANSFIELD—It is now settled, " That a release or bargain and sale by a tenant in tail gives a *base fee*, " voidable by the issue in tail." This is the principle of † *Machil v. Clark* : and many subsequent cases have been grounded upon it ; particularly, that of *Stapilton v. Stapilton*. †

† V. Salk.
619 ; Comyns
120, S. C. 7
Mod. 18. S. C.
11 Mod. 19,
S. C.

Besides, The common recovery has made good this defeasible estate,

† In chancery
—See 1 Atkyns
2.

Either ground makes an end of this question. The recovery takes off the fetters of the statute *de donis*.

Mr. Justice WILMOT concurred. The tenant in tail had a fee originally : and a common recovery leaves him a fee again, by removing the bar and fetters imposed by the statute. When the bar and fetters are removed, it then becomes just the same case as if he had been tenant in tail *ab initio*. And though *formerly* it was doubted " Whether a tenant in tail could, any otherwise than by a *feoffment*, " grant any thing *more* than for his *own life* ; " yet it is *now* settled, by the case of *Machil v. Clark*, " That he may, by " bargain and sale, or by lease and release, pass a *base fee*."

H h 4

And

1765.

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ex dimiss.
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Another.

And if so, it is in his power to limit the remainder, as he pleases. And it makes no difference, whether it is limited to the use of the bargainee or the releasee, or to a *stranger*, or to *himself* for life with remainders over: for the base fee feeds all the uses that are limited upon it; *till* avoided by the entry of the issue in tail.

Mr. Justice YATES—A lease and release, or a bargain and sale by the tenant in tail is *not absolutely void*; but conveys a *base fee, defeasible* by the entry of the issue in tail. This is now settled by the case of *Machil v. Clark*; and many determinations and conveyances are founded upon it.

Mr. Justice ASTON concurred.

THE COURT were, therefore, unanimously of opinion, "That the recovery *enured* to the uses of the *settlement*, " and that the plaintiff had *no* title."

JUDGMENT for the DEFENDANT.

Note.—The court determined this case without hearing Mr. *Dunning*, the counsel for the defendant.

Rex *versus* Atkins.

V. ante, p.
1693. S. P.
Indictment for
pulling off the
thatch of a
man's dwelling-
house, quashed.

AN indictment was quashed; being the same point with the three which were quashed yesterday: [V. ante, p. 1703.]

N. B. *This* was for pulling off the thatch of a man's dwelling-house; he being in peaceable possession of it.

Per Lord MANSFIELD and Mr. Justice ASTON—This is within the distinction taken yesterday: it is only for pulling off the thatch,

Rex versus Gillet.

THIS being an indictment like the 4th of yesterday, the same rule was made in this case, as in that: viz.

V. ante, ut supra; and also the very last preceding case; S. P.

That the rule for shewing cause why it should not be quashed, be DISCHARGED.

V. post, pa. 1731. *Rex v. Bake and fifteen others*, on the last day of this term. S. P.

Salvador versus Hopkins.

Wednesday, 18 June 1765.

Heaton versus Rucker.

THE question at present debated was, "Whether there should be new trials in these two particular actions upon a *policy of insurance*;" which had been tried before Lord Mansfield, at Guildhall; where a verdict was found for the plaintiff, in Mr. Salvador's case; and for the defendant, in Mr. Rucker's case.

Policy of insurance on East India ships, includes the chance of their being detained in India, and the risque of the country voyage there.

But there were *nine* causes, in all, upon the several insurances of this same *East-India* ship the WINCHELSEA, (Captain Howe, commander;) which were tried by special juries, at different times.

The charter-party, bearing date the 20th of *August* 1761, was according to a *printed* form, which has long been in use: in which, amongst many other provisions, there are the following.

" And to the end the said ship's *detention and stay* in *India*
" and her demorage for the same, if any shall happen, during her present intended voyage, may be *ascertained*, it is
" covenanted and agreed by and between the parties to these presents, that in case the said ship shall, within eight months after the delivery of the said ship's last dispatches from
" *England*, arrive at her first consigned port in the *East Indies*, *China*, *Mocha*, or elsewhere within the limits granted or allowed to the said company; and notice be given
" thereof, in writing, of her arrival, to the said company's
" *president*

1765.

SALVADOR V.
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BUCKER.

“ president, agent, or chief factor there; the said company
 “ will in such case, in four calendar months afterwards, or
 “ on or before the eleventh day of *February* which shall be
 “ in the year of our Lord 1763, or at farthest so soon after
 “ as the said ship, making all reasonable attempts, may get
 “ about the *Cape of Good Hope* so as to gain her passage home
 “ the same season, lade or cause to be laden on board the said
 “ ship, at some ports or places in the said *East Indies, China,*
 “ or elsewhere within the said limits, for *England*, so much
 “ goods and merchandizes (including therein the said
 “ tons of iron kintlage) as the said ship can conveniently stow
 “ and carry in her, in manner as aforesaid, as shall amount
 “ in the whole and together to the quantity of 484 tons;
 “ but in default of loading the said ship within the space of
 “ four calendar months after such arrival and notice given as
 “ aforesaid, the said ship shall from thenceforth enter into
 “ demorage of 20*l.* 3*s.* 4*d.* a day for so long a time as
 “ she shall be detained in *India, China*, or elsewhere within
 “ the said limits, in the service and employment of the said
 “ company. And furthermore, if the said ship shall, within
 “ the said eight months after she shall be dispatched from
 “ *England* as aforesaid, arrive at such port or place to which
 “ she shall be consigned, and give such notice as aforesaid;
 “ and yet is not dispatched for *England* within the said four
 “ calendar months, or the said eleventh day of *February*, or
 “ so soon after that the said ship (making all reasonable at-
 “ tempts) may get about the *Cape of Good Hope* so as to gain
 “ her passage home the same season; NOR DETAINED by vir-
 “ tue of the next ensuing or following proviso or covenant; then
 “ the said united company or their assigns shall allow or pay
 “ unto the said part-owners and master four months demor-
 “ age commencing from the said eleventh day of *February*,
 “ after the rate of 20*l.* 3*s.* 4*d.* a day, for and in consider-
 “ ation of the passage so lost, and her stay in *India*, after the
 “ said eleventh day of *February*: but in such case, no other
 “ demorage shall be paid in respect of the said ship's stay af-
 “ ter the said eleventh day of *February*. And contrariwise,
 “ if the said ship shall not arrive at her first consigned port
 “ within the space of eight months after such dispatches de-
 “ livered as aforesaid, that then the said company shall load the
 “ said ship as aforesaid, within four months after such her ar-
 “ rival, and such notice given thereof as aforesaid; or, in de-
 “ fault thereof, the said ship shall enter into the demorage
 “ of 20*l.* 3*s.* 4*d.* a day, immediately after the expiration
 “ of the said last mentioned four calendar months, for and
 “ during such time as she shall be detained by the said com-
 “ pany's presidents or factors, in the service and employment
 “ of the said company within the limits aforesaid: but then
 “ the said ship shall not have any further or greater allow-

“ ance,

“ance, though she be not dispatched so soon as to save her
 “passage that season, than four months demorage only in
 “consideration of the passage so lost, and her stay in *India*
 “or elsewhere abroad on that account; nor shall such four
 “months demorage, for the loss of such passage, be allowed,
 “if the said ship be by virtue of the said next ensuing proviso or
 “covenant detained in the said company’s service, or if she be
 “dispatched within the said last mentioned four months, un-
 “less it evidently be made appear, to the satisfaction of the
 “court of directors for the time being of the said United
 “Company, that the said ship was hindered from her arrival
 “in time at her first consigned port, by unavoidable accidents
 “only. PROVIDED always, and it is hereby covenanted and
 “agreed, that the said company’s presidents, factors and
 “agents shall have liberty to DETAIN the said ship, after the said
 “eleventh day of *February*, in their employment, in trade,
 “and also in warfare; and shall have liberty to let out the said
 “ship to freight, for the said company’s sole benefit, for so
 “long time as they please; so as such detention be signified
 “in writing, and doth not exceed twelve months from the
 “said eleventh day of *February*, and so as the said ship be
 “dispatched in a proper season to save her next year’s pas-
 “sage: in which case, the said company shall pay demorage,
 “for and during the term of her detention, after the afore-
 “mentioned rate of 20 l. 3 s. 4 d. a day, till she shall af-
 “wards be dispatched from her last lading port, or the expi-
 “ration of the said twelve months, which shall first happen.
 “But after the said twelve months are expired, the said ship
 “may return for *England*; and the said company shall not
 “be liable for any further demorage, or any damage that
 “may accrue by her detention after that time: and in case
 “all or any part of the said ship’s lading shall, after the ex-
 “piration of the said twelve months, be wanting, yet the
 “said company do agree, that the said ship may then return
 “for *England*; the master having first made legal demand,
 “thirty days before his coming away, and due protest for
 “want of the said lading. And furthermore it is agreed,
 “that if the said ship shall arrive at her consigned port with-
 “in eight months after delivery of the said ship’s dispatches
 “as aforesaid, and shall not on or before the said eleventh
 “day of *February* 1763 be dispatched for *England* as afore-
 “said, then the said United Company, their presidents,
 “agents, factors, or assigns, shall, over and above the value
 “of the said 490 l. sterling beforementioned to be allowed
 “to be carried out, supply unto the master of the said ship
 “for the time being, so many pagothas, rupees, or pieces of
 “eight, dollars, or other coins, as need shall require, for
 “buying victuals or other necessary provisions for the said
 “ship,

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“ ship, not exceeding the value of three hundred dollars for
 “ every one hundred tons the said ship is let for; valuing
 “ the money so supplied, at six shillings and sixpence a piece
 “ of eight or dollar in time of peace, and seven shillings and
 “ sixpence in time of war; and in the same proportion, for
 “ pagothas, rupees, and other coins. *And in case* the said
 “ ship shall not be dispatched by the said company’s presi-
 “ dents, agents, or chiefs in council aforesaid, on or before
 “ the eleventh day of *February* 1764, then the said persons
 “ who shall so *keep the said ship*, shall, over and above the said
 “ sums of money before mentioned, furnish and lend the
 “ master, or the master for the time being, if he desires it,
 “ so many pagothas or rupees more, not exceeding the va-
 “ lue of 300 *l.* sterling for every hundred tons the said ship
 “ is let for, as, upon a survey to be taken as before directed,
 “ shall appear necessary to enable the said ship to proceed for
 “ *England*; so as the whole of the money so furnished be
 “ actually laid out in necessaries for the said ship; valuing
 “ each of the said pagothas at nine shillings, and each
 “ of the said rupees at two shillings and sixpence: both
 “ which monies so supplied, with the advance of 40 *l.* for
 “ every 100 *l.* on the last mentioned supply of pathogas and
 “ rupees, for and in consideration of the risque of the said
 “ ship’s return for *England*, shall be paid or (at the company’s
 “ choice) allowed them out of the freight and demorage pay-
 “ able by virtue of these presents. And if the said ship shall,
 “ by written orders from the said company, be detained at
 “ *Saint Helena* or any other port, to stay for convoy, in such
 “ case the said company shall allow the said part-owners and
 “ masters two-third parts of the demorage a day before agreed
 “ on, for every day she shall be so detained: but no allow-
 “ ance shall be made to the said part-owners or master on ac-
 “ count of the said ship’s keeping company with any other
 “ of the company’s returning ships. But the said company
 “ shall not allow or pay any demorage for the time that the
 “ said ship shall take up in amending any defects: and fur-
 “ ther, if by the time taken up in repairing any defects in
 “ the said ship, she should exceed the times respectively li-
 “ mited for her stay in the *East Indies*, *China*, or other the
 “ limits aforesaid, or should thereby happen to lose her pas-
 “ sage for *England*, the said company shall in such case pay
 “ no demorage for such time so lost by repairing or amending
 “ any such defects, or for the passage lost thereby; EXCEPT
 “ and PROVIDED nevertheless, and it is hereby agreed, that
 “ if the said ship be *detained in the company’s service* longer than
 “ the said eleventh day of *February* which shall be in the year
 “ 1764, and by *reason thereof* shall have need of being re-
 “ paired, that then the said company shall pay or allow demo-

“ rage

"rage after the rate aforesaid, for every day the said ship shall
"be so repairing, so as the same do not exceed thirty days."

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The dates of the facts were as follows—

1762. *March 25th.* The ship sailed.

Sept. 19th. She arrived at *Bombay*.

Nov. 4th. She left *Bombay* the first time.

1763. *March 5th.* She arrived at *Calcutta*, in *Bengal*.

28th. The Presidency and Council of *Bengal* entered into a new agreement with the captain; reciting "That the charter-party would expire on the 11th *February 1764*: but that the president and council, finding it expedient to detain the ship in *India*, and desirous of having the time limited, in the charter-party, prolonged, &c."—The indenture therefore witnesseth, that the captain lets the ship to freight, for one whole year from the said 11th of *February 1764*, &c.

July The ship arrived at *Bombay*, a second time.

Dec. 11th. She left *Bombay*, to go to *Bengal*.

1764. She arrived at *Bengal*.

March 19th. The ship left *Bengal*, to go to *Bombay*.

21st. The ship was lost.

April 3d. Mr. *Hume* received a letter from the captain, dated 14th *April 1763*, inclosing a copy of the new agreement: which letter was publicly read in a coffee-house.

April 4th. Some insurances were made by Mr. *Hume*.

July 17th. Other insurances were made by Mr. *Hume*. All the other insurances were made, after the captain's letter of 14th

1712

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1764. October 9th.

14th April 1763 was received, and publicly read in a coffee-house.

An account was received in London, of the ship's loss. All the policies had this description—"At and from Bengal, to any ports or places where and whatsoever in the East-Indies, China, Persia, or elsewhere beyond the Cape of Good Hope, forwards and backwards and during her stay at each place, until her arrival at London; on money advanced or to be advanced for bills drawn by the captain for the use of the ship *Winchester*, and for account of the owner; and upon money advanced or to be advanced as absence-money, to pay the ship's company; all or either, as interest shall appear; at 4 per cent."

The underwriters insisted, that the policies were void, because at the time of underwriting, they were not expressly told of the new agreement "To detain the ship in India for a year longer than the enlarged time provided for by the charter-party, which expired on the 11th of February 1764."

The causes were at first tried with different success: but all the nine verdicts were at last uniform, for the plaintiffs, the insured against the underwriters.

The reasons which governed the court on granting or refusing new trials were—that the underwriters are bound and presumed to know the course of the East-India trade, the terms of the charter-party, and the destination of the India ships (which are under the direction of the company, and not of their owners):—that the charter-party is a printed form, of a very long standing—that, besides the liberty thereby given, "To prolong the ship's stay for one year," it is very common, by a new agreement, to detain her a year longer; (for, no ship comes home in ballast;) and the longer a ship is kept, the more beneficial it is to the owners.—That the words of the policy are adapted to this usage; being without limitation of time or place; and without any reference to the first voyage particularly mentioned in the charter-party.—The terms of the policy precisely describe the risk, in it's utmost latitude; and necessarily extend to every prolongation of stay, and every country-

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country-voyage.—That any of the defendants might have learned at the India-house all that was to be known.

No mention was made, or question asked, at the time of underwriting, "*When the ship was chartered;*" "*When she sailed from England;*" "*When she arrived in India;*" "*Whether she was continued a year,*" according to the proviso in "*the printed charter-party;*" and yet her continuance in the *East Indies* depended on all these facts.

If they ought necessarily to be disclosed, the policy was void, to the knowledge of the underwriters, at the time they took the premium.

The chance of her stay is one of the risques insured.

The evidence in all the causes was very strong, "That her staying a year longer, if known, would not have varied the premium."

This ship was insured at the same premium, after the prolongation of her stay in India was known.

None of the defendants desired to be off, after they knew that an account of the new agreement "*To prolong her stay for a year longer*" had been received in England upon the 3d of April 1764: which was notorious to them ALL, before the intelligence of her loss, which came in the October following.

So that if there had been any force to the objection, it would have been waved by the acquiescence of the underwriters, after they were fully apprized of the whole.

The nine causes were these: 1st. *Heaton v. Rucker*; 2d. *Salvador v. Hopkins*; 3d. *Hume v. Jebb*; 4th. *Hume v. Tidswell*; 5th. *Black v. Boehm*; 6th. *Black v. Innys*; 7th. *Hume v. Da Costa*; 8th. *Black v. Bond*; 9th. *Hume v. Boehm*. No. 1. was tried, the first time, on 26th February 1765; and a verdict found for the defendant: it was tried, a second time, on 10th July 1765; and a verdict found for the plaintiff. No. 2. was tried on 26th February 1765; and a verdict was found for the plaintiff. No. 3. was on 28th February 1765; and a verdict found for the plaintiff, the defendants not making any defence. No. 4, 5, and 6. were verdicts for the plaintiff, without defence, given at the same time with No. 3. No. 7. was tried on 1st March 1766; and a verdict for the plaintiff. No. 8. was on 4th July 1766; and a verdict for the plaintiff. No. 9. (*Hume v. Boehm*)

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v. *Boehm*) was tried on 4th July 1766: a verdict was found for the *defendant*; and a *new trial* moved for on Friday the 7th, and granted on Monday the 24th of November 1766. It was accordingly tried a second time, upon the 5th of May 1767: and the jury found a verdict for the *plaintiff*, without going from the bar.

As these causes are very much blended together in their nature and circumstances, I take the matter up here (though anticipated in point of time;) and include the *whole* of the motions for new trials in all these causes, in *one* single report. Perhaps, the best method of rendering the whole matter clear and intelligible, would have been, to have begun with Lord Mansfield's report in this last cause of *Hume v. Boehm*; which gave the exact history of all the rest, and particularized the evidence: but the great length of such a report might have been objected to.

THESE two causes of *Salvador v. Hopkins*, and *Heaton v. Rucker*, being so very nearly connected with each other, were taken up together, and argued jointly, as if they had been but one single cause.

On Friday 17th of May last, they were argued by Mr. Morton, Mr. Coxe, Mr. Walker, Mr. Dunning, and Mr. Heaton, on behalf of the plaintiffs; and by Sir Fletcher Norton (Attorney General) for the respective defendants, in both causes.

The COURT took time to advise.

LORD MANSFIELD now delivered the unanimous opinion of the court, "That there ought to be a *new trial* in the case " of *Heaton v. Rucker*; but not in that of *Salvador* against " *Hopkins*."

They thought the usage of the *East India Company's* trade and the *course of their voyages*, to be in fact so *notorious*, and so well known both to the insurers and the insured, that they must be supposed fully apprized and sufficiently *consant* of it; and that the obligation of this policy is to be taken, from the *words* of the charter-party, (which refer to the usage,) and the *usage* of these voyages, in the same manner as if it was expressly inserted in the policy.

His lordship entered into the reasons of their determination in these two causes with more particularity than may be necessary here to specify; as I have already mentioned those which seemed to govern their general determination in all the *nine* causes.

THE

THE COURT esteemed this to be the most convenient way of determining this question; because whoever shall hereafter insure on an *East India* ship, will know that he insures the contingencies; and may take proper precaution against them, if he will: whereas if every person insured should be obliged to open to the insurer *all* the grounds of his expectations about the ship's continuance in the *East Indies*, or coming to *England*, it might produce great litigation and confusion in cases arising upon these *East India* policies.

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HOPKINS.
HEATON V.
RUCKER.

The RULES then made were,—That in *Salvador v. Hopkins*, there should be

No new trial:

But in *Heaton v. Rucker*,—There should be

A new trial.

THE CAUSE of *Hume v. Boehm* was not tried till long after this determination in these two causes*: and the verdict being for the defendant, Mr. *Morton* moved, upon the 7th of November 1766, on behalf of the plaintiff, for a *new trial*; the verdict being, as he alledged, contrary both to law and evidence:

* V. ante, p. 1713.

RULE to shew cause.

On Monday the 24th of November 1766, Sir *Fletcher Norton* shewed cause.

The great question was, "Whether the circumstances of the case and the facts were sufficiently communicated to the underwriter, at the time of his underwriting the policy."

THE COURT thought they were.

They held that the understanding of the policy must depend upon the *course* and *usage* of the *East India* trade; and conceived it to be *contradictory* to the policy, to say, "That the underwriter did *not* underwrite for a country-voyage;" and were unanimous in making the rule absolute, for a

NEW TRIAL.

This cause of *Hume v. Boehm* was tried the second time, upon the 5th of May 1767: and the jury found a verdict for the *plaintiff*, without going from the bar.

1716

Trinity Term 5 Geo. 3. B. R.

1765.

Rex *versus* Robert Hann and John Price,
Justices of Peace for the Burrough of Corfe-
Castle.

Thursday 13
June 1765.

Information
granted against
justices of peace,
for refusing to
grant ale licence
from motives
of resentment.

CAUSE was now shewn against an information which had been prayed against them, for a misdemeanor in the execution of their office, as justices of the peace for the said burrough, in *refusing* to grant a *licence to sell ale*, to one *Ingram* an innkeeper in that burrough; MERELY from a motive of RESENTMENT against him, for having joined in an affidavit made in support of the interest which was adverse and opposite to that which was espoused by these two justices and their friends.

Their defence was, that they did not act from any resentment, or other corrupt motive; but solely because *Ingram* was an improper person, and had kept a disorderly house, and continued to keep it after full notice to the contrary; and in particular, that he encouraged gaming and cock-fighting at his house.

Lord MANSFIELD—The Court should never interpose against magistrates,* unless they have acted from bad motives and *mala fide*; especially in a such a case as this, where they are entrusted with an *absolute discretion*. But, for that very reason, this is the strongest case for the interposition of the court, *if* it appears that they *have* acted upon corrupt motives.

If it appeared clearly, that this man did keep a disorderly house, it would be a reason against the court's interposing against the justices. But this does *not* clearly appear.

Upon the whole, he thought, and by a full discussion of the affidavits shewed why, the thought the charge upon the justices was *not* satisfactorily answered by them: and he declared it to be of very dangerous consequence, to permit the due discretion of the justices to be influenced by considerations of this kind.

The COURT thought it a proper case for an information: and made the

RULE ABSOLUTE.

V. post, (pa. 1786.) 20th Nov. 1765.

Evelyn,

Evelyn, Bart. Executor of Sir John Evelyn,
Bart. *versus* Chichester, Esq;

THIS was a special case from Surrey assizes:

It was an *indebitatus assumpsit*, wherein the plaintiff declared as executor to his father, for 150*l.* assessed for a FINE for the admission of the defendant to a customary tenement called Daniels, within the manor of Abinger, of which Sir J. E. the father was lord: which customary tenement consisted of a large capital mansion-house and a small parcel of land, which land was let for 7*l.* a year, subject to land-tax, quit-rents and other outgoings; but the mansion-house had been unlet from the time of the admission of the defendant to the time of the action brought; Mr. Chichester's agents not being able to let it, though it was advertised for that purpose.

On the trial, it was proved, that Sir J. E. the father was lord of the manor. That on presentment of the death of the defendant's father John Chichester, who died seised, three proclamations were made for the defendant to come in and be admitted. That on the 4th of March 1747, the defendant was admitted to the said customary tenement, in person; and the guardianship committed to Sir Roger Newdigate and John Ludford, esq; they rendering an account: and upon such admission, a fine was duly assessed, of 150*l.* payable on the 12th day of April then next following, at the mansion-house called Abinger Court; being the like sum as was assessed for a fine on the last admission of the defendant's father. That the defendant was, at the time of his admission, of the age of 6 years or thereabouts. That the said Sir J. E. the father lived about 16 years after the said admission; and then died: and about two years after the defendant came of age, this action was brought against him by the plaintiff, as executor of his father, for the said fine; the defendant, his guardians, or their under-tenants having been in possession of the premises from the time of his admission to the time of commencing the action. The under-tenant had paid the quit-rent as it became due, (though he said he had no direction to do so,) up to the present time.

The jury being of opinion "That the fine was a reasonable one," found a verdict for the plaintiff, for 150*l.* but subject to the opinion of the court on the following question—

Friday 14 June
1765.

Lord of manor
may maintain an
action against an
infant copyhold-
er, when he
comes of age, for
fine on his ad-
mittance during
his non-age.

1718

Trinity Term 5 Geo. 3. B. R.

1765.

EVELYN V.
CHICHESTER.

Question—"Whether *this* action will lie against the defendant; he being a MINOR, at the *time* of the fine being assessed."

Mr. *Cove* for the defendant, admitted "That *this* action of *indebitatus assumpsit* does lie by an executor, for a copyhold fine set by his testator," since the determination of the case of *Skuttleworth v. Garnet* reported in 3 *Levi* 261. and 1 *Show* 35. and 3 *Mod.* 239. and *Carthew* 90. S. C. where three judges held, against *Holt*, "That an *assumpsit* would lie by an administratrix for a fine of a copyholder." But Mr. *Cove* insisted, that it does not lie against a *minor*: it is not such an action as will lie against an *infant*. There is a case in point, "That an action of *debt* would not lie." 1 *Ld. Raym.* 36. *Borough's* case; "Debt will not lie against an *infant*, for a copyhold fine upon his admission. And therefore an *infant* arrested upon such an action, being five years of age, was discharged."

And the *infant* has done nothing since he came of age, to ratify, what was done before. Here is a *large* capital mansion-house, *unlet* at the time the action is brought: of which the defendant's guardians or under-tenants have been in possession; and the tenant has continued to pay the quit-rent, but without his direction. Now this could not be for the benefit of the *infant*.

The rent of the land is only 7*l.* Therefore a fine of 150*l.* is unreasonable.

It is stated, that the *infant* was 6 years old, when he was admitted: and guardians were then appointed. It shall be intended, that these guardians were appointed under the act of 9 G. 1. c. 29.

I do not say, that the lord is not intitled to a remedy: I only say that he is not intitled to *this* action of *indebitatus assumpsit*.

Mr. *Bishop*, *contra*—This is an action brought after the *infant* came of age. The case cited from Lord *Raymond* was an action brought pending the infancy.

The plaintiff has no other remedy. The statute of 9 G. 1. is not found by the jury.

This

This admission *was* for the benefit of the infant; for, if he had not been admitted, he could not have enjoyed the rents and profits. He took nothing, till his admission. I agree, that neither debt nor *assumpsit* could have been brought against the infant, during his infancy.

1755.

EVELYN V.
CHI. MASTER.

The act of parliament of 9 G. 1. c. 29. was made for the mutual benefit of lords and infant-tenants: it is intitled "An act to enable lords of manors more easily to recover their fines: and to exempt infants and femes covert from forfeitures of their copyhold estates, in particular cases." But there was no proceeding under this act, in the present case.

If Sir John Evelyn had entered, under this act, he must have been a sufferer; as it was a large old house, in a bad country, and untenanted.

The defendant has actually received the rents and profits of this estate, for near 20 years. It has been, all this time, in the possession of "him, his guardians or under-tenants," which is his possession.

And the fine is stated to be a reasonable one.

Lord MANSFIELD—There is no giving an opinion upon this case, seriously.

Here is a reasonable fine assessed, the same as his father paid; an enjoyment for 16 years, and part of it, since he came of age; and no renunciation of the estate—; on the contrary, a confirmation of the transaction.

Mr. Justice WILMOT—An entire confirmation. I have not the least *scintilla* of doubt.

Mr. Justice YATES—If the defendant was still an infant, I should think this action maintainable. Debt, perhaps, would not lie, because an infant cannot wage his law; but *assumpsit*, I think, would lie; as the infant continued to occupy and enjoy the estate.

In 2 Bulstr. 69. Kirton v. Elliott—The plaintiff recovered against an infant the rent upon a lease made to him: and it is there said—"If a lease be made to an infant, and he occupies and enjoys, he shall be charged with the rent."

1720

Trinity Term 5 Geo. 3. B. R.

1765.

EVELYN V.
CHICHESTER.

An infant may contract for necessaries. He could not have received the rents and profits of this copyhold, without admittance: and he must previously pay the fine for such admittance. But here, he has affirmed the whole transaction: he has enjoyed two years, since he came of age.

Mr. Justice ASTON was of the same opinion.

Per Cur.—unanimously,

The *Postea* must be delivered to the PLAINTIFF.

Rex versus Midlam.

Idem versus Eundem.

Where bringing a certiorari will not entitle the prosecutor to costs upon affirmation of conviction.

SIR Fletcher Norton, on behalf of the prosecutor, shewed cause against a rule which had been made upon him, to shew cause. "Why I should not be directed by the court, to forbear, and not to proceed to tax the prosecutor his costs in these causes, relative to the affirmance of the convictions against the defendant in these causes;" and also "Why the bond entered into by or on the behalf of the defendant, on allowing the certiorari, should not be delivered up to the said defendant or his clerk in court to be cancelled."

This certiorari was brought for removing a conviction upon the *game-laws*: and the present rule was grounded on an affidavit of hardship and oppression upon the defendant; namely, that although the defendant had paid the forfeiture upon the conviction, yet an action had been brought against him for the same offence; and when he wanted to plead this conviction in bar of the action, the justice had refused to give him a copy of it; and he was obliged to remove it by certiorari; and the prosecutor set it down in the paper, and got it affirmed; and then the prosecutor became nonsuited in the action.

Sir Fletcher, on behalf of the prosecutor, insisted on having his costs.

He urged, that the act of 5 Ann. c. 14, § 2, directs full costs to be paid upon removing these convictions, in case the conviction be affirmed. And this is general; and they must be paid in all cases where the conviction is affirmed; be the

1765.

Rex v.
MIDLAND.

certiorari brought "upon ANY pretence whatsoever": (for, so the act of parliament is expressly worded.) And this conviction was affirmed. Therefore the court cannot, upon this man's own affidavit, enter into the cause or occasion of the removal of the conviction by this *certiorari*.

Mr. Wheeler and Mr. Walker, *contra*. The removal of the conviction was absolutely necessary here; in order to it's being pleaded to an action brought for the same offence, under the 8 G. 2. c. 19. § 2. so that this was not an *adverse* proceeding; nor was the *certiorari* brought for vexation, but from necessity.

The case of *Rex v. the inhabitants of Madley*, in 2 Sir J. S. 1198. is not unlike the present. The order was affirmed as to the father and mother, but quashed as to the daughter. It was resolved, that the parish who removed the order should not pay any costs: otherwise, where a *certiorari* is brought unnecessarily, and consequently vexatiously; which, the court there said, was the true test to go by.

Now the present case falls within that true test: the removal was not unnecessary; and consequently, not vexatious.

This defendant had paid the penalty: and then the prosecutor brought an action for the same offence. The conviction was, therefore, necessarily to be removed: it was not removed upon a frivolous or vexatious cause. The whole effect of it was over: the penalty had been actually paid. The action brought for the same offence was mere oppression: the vexation was exercised upon the defendant, not by him.

Sir Fletcher Norton said, the defendant might have quashed the conviction if it was bad: and the penalty must have been refunded,

LORD MANSFIELD—This is not a case within the intention of the act of parliament of 5 Ann. c. 14. § 2. for, this *certiorari* was not brought for vexation, or out of obstinacy or perverseness: nor to over-hale or object to the conviction: but an action being brought for the same offence, the defendant in that action could not obtain (though he ought to have had it) a copy of the conviction from the justice of peace who made the conviction; and therefore he was obliged to bring a *certiorari*, to remove it; and he removed it for that purpose only. The prosecutor had no occasion, therefore, to be at any expence about it: for, the defendant did not object

1765.

REG.
MIDLAM.

to it. But the *prosecutor* set it down in the paper, only to increase expence, and merely for vexation; supposing "That" the *defendant* would have been obliged to pay for it." The plaintiff in the action was nonsuited: and I think the *defendant* (instead of *paying* costs) ought to have had an *allowance* of the costs he was put to in removing the conviction; as it was a *necessary part of his defence*.

Therefore the present rule ought undoubtedly to be made absolute.

Mr. Justice WILMOT—This is one of the many cases where poachers are pursued with *unremitting vengeance*. Here was not only *that*; but *gross oppression* also. He was extremely clear, that this was not a case within the intention of the second section of the 5 *Ann. c. 14.* and he thought (as Lord Mansfield also did) that the justice ought to have given the defendant a *copy of the conviction*, without putting him to the trouble and expence of bringing a *certiorari* to remove it. The bringing the action for the *same offence* was a *gross oppression*; and the plaintiff in it was nonsuited. And though he knew that the *certiorari* was brought only from necessity, (as the justice had *refused* to give the defendant a copy of it;) and that the defendant had actually *pleaded* it, and used it *as a good one*;—*what*, but *oppression*, could induce the prosecutor to set it down, and get it *affirmed*? he had had the effect of it: the penalty had been paid.

Therefore he concurred with Lord Mansfield, that the rule ought to be made absolute.

Mr. Justice YATES also concurred, for the same reasons.

The justice ought to have given the defendant a *copy of the conviction*: for it was a *record*; and the defendant was *intituled* to it. And he ought to have been *allowed the expence* of his *necessarily* bringing this *certiorari*, in *costs* upon the nonsuit: for it was *necessary to his defence* in the action. He did not remove the conviction, in order to object to it: on the contrary, he had submitted to it, and had paid the penalty. He removed it out of *necessity*: it was *necessary* to his defence in the action.

He thought this proceeding of the prosecutor to have been a very oppressive one, in every stage of it; and that the bringing the *certiorari*, under the circumstances of the present

sent case, did not intitle the prosecutor to his costs upon affirmation of the conviction: and therefore this rule ought to be made absolute.

1765.

REX v.
MIDLAM.

Mr. Justice ASTON was clearly of the same opinion.

Per. Cur.

RULE MADE ABSOLUTE :

And the prosecutor to pay the costs out of pocket of this application.

Millar *versus* Yerraway.

Saturday 15
June 1765.

MR. Bearcroft on behalf of the defendant in error, shewed cause against a rule which had been obtained by the plaintiff in error, for the defendant in error to shew cause "Why the writ of *scire facias*, on which the defendant in the original action (the present plaintiff in error) had been summoned, should not be set aside for irregularity."

Sci. fa. in error needs not lie four days in the office before the return.

Mr. Walker (who obtained the rule) had objected on behalf of the plaintiff in error, "That this writ of *scire facias* had not lain FOUR days in the office, before its return."

But THE COURT took a distinction between writs of *scire facias* in error, and writs of *scire facias* against bail: * It is not necessary, in the former case, "That the *scire facias* should lie in the office before the return;" though it is necessary, in the latter. And the rules that have been made for the *scire facias* lying four days in the office, relate (as Mr. Justice Yates observed) only to writs of *scire facias* against bail.

* V. post. 5th
June 1769,
Groff v. Nask
accord.

Therefore they DISCHARGED the RULE.

Greetham, Widow, *versus* the Inhabitants of the Hundred of Theale.

Monday 17
June 1765.

THIS was an action brought by the party grieved, against the inhabitants, on 9 G. 1. c. 22. § 7. for satisfaction and amends for the damages sustained by the maliciously setting on fire a barn and outhouse belonging to the plaintiff: in which action, the plaintiff was nonsuited; and on an application by the defendants to the master, "To tax the costs of the nonsuit," he doubted "Whether the defendants were intitled to them."

Wherever plaintiff would be intitled to costs, defendant is so reciprocally.

Where-

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THRALE IN-
habitants.

Whereupon, Mr. *Afshurst*, on behalf of the defendants, now moved for the direction of the court, to the master "To tax them."

He mentioned the statute of 18 *Eliz. c. 5.* made for the restraint of informers upon penal statutes: by the 3d section of which, an informer upon a penal statute shall pay costs, if nonsuited. And he urged and relied upon that of 4 *Jac. 1. c. 3. § 2.* "That if any person sues, in any court, any action wherein the plaintiff or demandant might have costs if judgment should be given for him; the defendant shall have judgment to recover costs against such plaintiff or demandant, if he be nonsuited, or a verdict pass against him." And he cited the case of *Bellasis v. Burbriche*, in 1 *Ld. Raymond* 172. to prove "That where an action upon a penal law is brought by the party grieved, he shall have his costs." And as this action is brought by the party grieved, who would have received costs, if he had prevailed; it is clear, that he must pay costs, upon being nonsuited.

Mr. *Stowe*, on behalf of the plaintiff, opposed this motion. He admitted, that where the party grieved sued as being so, he should have his costs: but a common informer, he said, shall not have his costs, though he be the party grieved. But the defendant shall have no costs, even where the action is brought by the party grieved.

And he cited the following note, out of 1 *Salk.* 30. "Note. Where a statute gives a penalty to a stranger, and he sues, he is a common informer, and shall pay costs upon the 18 *Eliz.* but where the statute gives it to the party grieved, he is not a common informer, nor liable to pay costs within the 18 *Eliz.* 1 *Anderson* 116. 3 *Cro.* 177."

* V. § 1.

Mr. *Afshurst*, in reply. Perhaps, we may not be intitled to costs under the 23 *H. 8. c. 15.** but we certainly are, under 4 *Jac. 1. c. 3.*

THE COURT held, that wherever the plaintiff would be intitled to costs, the defendant is so, reciprocally. Here, the plaintiff, the party grieved, would have been † intitled: therefore, as it is mutual and reciprocal, he is liable. And accordingly they gave directions to the master

† Q. of this
assertion "That
" would have
" been intitled to
" costs." See
what was said by
Mr. Justice Al-
ton, in the case
Wilkinson qui tam, &c. v. Alliot, Clerk, 27th Nov. 1775. B. R.

TO TAX THE COSTS.

Rex

Rex versus Inhabitants of Uttoxeter.

See this case at large, in my SETTLEMENT-CASES, No. 172. p. 538. and abridged, in the TABLE to this volume.

Weston versus Mason:

Thursday, 20
June 1795.

Weston versus Chapman.

ON Monday the 10th instant Mr. Dunning, on behalf of the defendants, moved in arrest of judgment; a verdict having been found for the plaintiff.

Court will, after verdict, overrule an objection, which they would have listened to, upon demurrer.

It was an action of debt on bond, brought against the sureties of a sheriff's bailiff. Oyer was prayed of its condition. The condition recites, "That the sheriff has appointed this person a bailiff for the hundred of *East Gotson*:" if therefore he shall duly execute his office, &c, WITHIN that hundred; and shall duly execute all warrants directed to him, and make due and sufficient return thereof, &c; then the bond to be void. Performance of the condition was pleaded. To which plea the plaintiff replied, and assigned a particular breach. The breach assigned by the plaintiff was, "That this bailiff had not made a due return to a particular warrant directed to him." The defendant rejoins "That he had."

Mr. Dunning's objection was, "That this man is only appointed bailiff of a particular hundred; and the warrants to which he was obliged to make returns are confined to the particular hundred of which he was bailiff: and it does not appear, that the warrant which he is charged not to have returned, was directed to him as bailiff of the hundred. And if not, he was not obliged to return it."

The case of *Stoughton v. Day*, Hil. 22 C. 2. in *Aleyn* 10. is in point: it is exactly the same case with the present, in all its circumstances; except that that was a warrant on an execution; this, on mesne process. And that case is cited and approved by Mr. Justice Twissden, in 2 Saund. 414. (in the case of Lord Arlington against Merriske.)

Sir

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Mason.
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Sir *Fletcher Norton* and Mr. *Ashburst* now shewed cause why the judgment should not be arrested.

As to the objection, "That he was appointed bailiff for the hundred of *East Gosfon* only" — This does not appear, otherwise than by the *recital* in the condition of the bond. Besides, the warrant was *directed to him*, and *delivered to him*: therefore he ought to have *returned it*.

These bailiffs are appointed bailiffs of a particular hundred, merely to prevent confusion in summoning juries, and *such like purposes*: but as to *executing mesne process*, they are not confined to the particular hundred; in *that respect*, they are bailiffs for the *whole county*. Otherwise, there must be as many warrants as there are hundreds in a county: which would be very inconvenient.

The court cannot make such an intendment, upon these pleadings. The defendant pleads this condition of the bond, and a performance of it. The plaintiff shews a breach, in not executing a particular warrant. The defendant rejoins "That the bailiff *did* execute it." Issue is joined thereon: and a verdict for the plaintiff.

The case cited from *Aleyn* proves only, "That as the defendant was *not obliged* to execute the writ there in question, he could not be charged for not executing it." But *here*, the defendant does not pretend "That he was not *obliged* to execute it." If he had pleaded that, it had been another thing. Here he is estopped from saying "That he was not bound to execute it:" for, he has *received it*. *That case* was on demurrer: *this*, after verdict. Therefore it shall be supposed, "That every thing necessary to maintain the action was *proved*."

The *practice* is, for sheriffs to direct these warrants, *generally*; and not "To the bailiff of a particular hundred."

If this was a good objection, there would be an end of all sheriff's bonds.

They therefore prayed judgment upon their verdict.

Mr. *Dunning* and Mr. *Davenport*, *contra*, for the defendants, insisted upon the case cited from *Aleyn*, as being a case in point: the condition was in the very words of the present condition. There too, the bailiff *had executed* the writ, as well as here. And they alledged, that upon looking into the record

record of that case of *Stoughton v Day*, it agreed with the present record. Moreover, that case has been recognized, in a case subsequent to it, viz. 2 *Saund.* 414. Lord *Arlington v. Merricke*.

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They admitted, that the bailiff *might* execute a writ out of the hundred; but insisted that he was *not bound* to do it, *under this obligation and condition*: and if he was not bound to execute, he was *not bound* to return it. But admitting even "That he himself having undertaken to do it, was answerable for doing it regularly"; yet the present defendants are not answerable for his doing so. For, these defendants are the *sureties* of the bailiff; *not* the bailiff himself. Therefore under this *general* direction of these warrants, *they* are not bound: for they have undertaken for no more than his behaviour *within this particular hundred*. The bailiff himself may perhaps be answerable for the regular executing this writ, having undertaken it: but the *sureties* are not; it is not within *their* undertaking.

As to the general principles of arresting judgments, they cited 1 *Salk.* 77. title "Arrest of Judgment." 1 *Bulstr.* 173. *Hob.* 301. and *Carthew* 148.

As to the *verdict* curing the defect—The plaintiff *not* having alleged, it was *not necessary* for the plaintiff to prove, either "That the writ was directed to him *as* bailiff of the hundred of *East Gosson*;" or, "That it was to be executed *within* that hundred."

LORD MANSFIELD---

The condition of this bond appearing upon oyer, the plea alleges a performance of it, by the bailiff's having duly executed, and made due and sufficient returns to *all* warrants directed to him. The plaintiff replies, and specifies a particular warrant which he did *not* duly return. The defendant does not demur; but *takes issue* upon the fact. It does not appear that this warrant was directed to him *as* bailiff of the hundred. Therefore it is said "That he was not obliged to execute it:" and a case is cited out of *Aleyn*, as in point.

But the case out of *Aleyn* * was upon a *demurrer*.

* N. B. This case of there reported)

Stoughton v. Day is also reported in *Style* 18. And (though very erroneously it appears both from *Style*, and from *Aleyn*, "That was upon a *demurrer*."

If it stood upon the construction of the bond, I should have desired to consider of it: but this being in arrest of judgment after

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after a verdict, and not on demurrer; it does not appear that it was not directed to him as bailiff of the hundred.

Mr. Justice WILMOT—If it had stood upon a demurrer, I should have thought the case in *Aleyn* to have been in point.

If it had stood upon the whole, and upon the construction of the bond, I should *rather* think (with Mr. Attorney) "That, in general, he had an authority, *as to executing process*, all over the county:" but I give *no* opinion, as to this.

But, upon *this record*, we can not take the warrant to be directed to him *otherwise than as* bailiff of the hundred. And by joining issue on the fact of returning it, he *admits* "That it was *not* directed to him *generally*." And since he has admitted the *execution* of it, we can not intend that it was *not* directed to him *as* bailiff of the hundred, in order to *arrest* a judgment.

Mr. Justice YATES—The case in *Aleyn* was determined on a demurrer; (a general demurrer indeed: but it was before the statute of queen *Anne*.) Therefore *that* case does not affect *this*.

* V. 4, 5 Ann.
c. 16. § 1.
Concerning
special demur-
gers.

A *verdict* will aid a title defectively set forth; though not a total defect of title.

But here, it was sufficient for the plaintiff to pursue the words of the condition of the bond: and it lay upon the *defendant*, to shew "That this was *not* such a warrant as was within the condition. Whereas he admits, that the bailiff *returned* this warrant: which is an admission of its being a *proper* one. And the court will not *intend* it to be otherwise, in order to *overturn* a verdict.

I am therefore clear, that the plaintiff is intitled to his verdict. The defendant has not chosen to take the opportunity of shewing what he might have done, if true.

Therefore there is no ground for arresting the judgment.

Mr. Justice ASTRON concurred; and joined likewise in observing that the defendant might have taken the proper method of stating the particular fact to his advantage, by a rejoinder;

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rejoinder, if his case would have born it; whereas he has declined that, and taken issue upon the fact generally assigned.

Per Cur.

Posse to be delivered to the PLAINTIFF,
in both causes.

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MASON.
Same v.
CHAPMAN.

Rex v. Inhabitants of White Church Canon-
icorum.

See this case *abridged*, in the TABLE; and *at large* in the
quarto-edition of my SETTLEMENT-CASES, No. 173.
pa. 540.

Biffex versus Biffex.

Friday, 21
June 1765.

THIS was an action of debt on a bond dated 28 *March* 1764, conditioned to perform an award to be made and delivered on or before the 21st of *May* then next following. The defendant pleaded, "That the arbitrators did not make any award on or before 21st *May*." To this, the plaintiff replied, "That the arbitrators in the said condition mentioned, after the making of the said writing obligatory, and before the exhibiting of the bill of the plaintiff, *to wit*, on the 21st day of *May* in the said condition mentioned, did make their award; and thereby ordered *Edward Biffex*, the defendant, to pay 56*l.* due to the plaintiff, on divers accounts, from *John Biffex* deceased, the defendant's father." The defendant demurred specially to this replication; and for cause shewed, 1st. That it does not shew that the said award was made and ready to be delivered to the parties *on or before the 21st day of May*: but the pretended time of making the said award is included under a *videlicet*, and not made or attempted to be made *part of the issue* in this cause. 2dly. That it was made concerning transactions supposed to have passed between the plaintiff, and *John Biffex* deceased; without shewing that such transactions were ever submitted to arbitration by the bond. 3dly. That the replication was a mere negative pregnant, neither confessing or avoiding, traversing or denying the matter alledged by the plea.

The plaintiff joined in demurrer.

Mr,

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Mr. Gould for the defendant, argued that it don't appear that this award was made *within the limited time*. For the time of making it is not positively directly and precisely alledged; but *only* comes under a *videlicet*: it is not alledged with sufficient certainty, for the defendant to have taken issue upon.

He cited the case of *Skinner v. Andrews* in 1 *Siderf.* 370; and 2 *Keb.* 361, 368; and the Bishop of *Lincoln v. Wolforstan. Trin.* 4 *Geo.* 3. B. R.† to prove, that it was bad upon a special demurrer.

† V. ante,
ps. 1508. and
1509.

Mr. Wallace, for the plaintiff, likewise cited the same case of *Skinner v. Andrews*, from 1 *Saund.* 169; and said it was precisely the same case as the present,

† V. 2 *Kebble*
361. 388. and
1 *Levinz.* 245.

The † other reporters of *Skinner v. Andrews* all agree, "That it was positively enough alledged."

And the record shews that the award was dated on that day.

* Lord Mansfield was gone.

Mr. Justice WILMOT *—The award was in fact made on the 21st of *May*. The defendant says "No award was made." To this, the plaintiff replies, "That an award was made, after the making of the bond, and before the exhibiting of his bill, *to wit*, on the 21st day of *May*."

It seems to me to be a *positive* averment. I would have adhered to a case *directly in point*, even against my own common sense. But this case of *Skinner v. Andrews* is not so. It was upon a *general* demurrer. *Saunders* was the most accurate reporter of his time: and he says, "It was holden to be positively enough alledged." If any thing was thrown out by any of the judges, not founded on any argument, it was extra-judicial, and not to the point before them.

Mr. Justice YATES concurred—*Saunders* was much the most accurate of the reporters of his time: and he reports, "That all the court were of opinion that the *scilicet* was *sufficient*." The time of making the award is material: and therefore this allegation of it shall be taken affirmatively. And the date of the award appears to be so. The defendant might have taken issue upon it.

Mr. Justice ASTON was of the same opinion,

Per Cur. unanimously,

JUDGMENT for the plaintiff.

Fontanier

Fontainier *versus* Heyl.

Saturday, 22
June 1765.

MR. Jones shewed cause against the rule which had been obtained by Mr. Attorney General, for the plaintiff to shew cause why an execution should not be set aside, and restoration, &c, made to the defendant, upon the foot of his being under a regular protection as the domestic servant of a foreign minister; viz. *valet de chambre* to Count Haslang.

Defendant, in order to substantiate his claim to privilege, as a domestic to an ambassador, ought to shew nature of service, and swear to the actual performance of it.

Mr. Jones's cause was (and it was well supported by affidavits, as well as by writing under the defendant's own hand,) that he was a *trader*, and called himself *merchant*; and that the being *valet de chambre* to Count Haslang was mere sham and pretence. (And so it most plainly appeared to be.)

THE COURT saw it in the same light: and they held it necessary that the defendant himself ought, in these cases, to shew the nature of the service, and swear to the actual performance of it.

RULE DISCHARGED, as to the plaintiff; but made absolute as to the bailiffs, (who had not exculpated themselves from the charge of misbehaviour in executing this *fieri facias*.)

Rex *versus* Inhabitants of St. Luke's, in Middlesex.

(1 Black. Rep. 553. S. C.)

Wednesday,
26 June 1765.

See this case *abridged*, in the TABLE; and at *large*, in my SETTLEMENT-CASES in quarto, No. 174. pa. 542.

Rex *versus* Bake and Fifteen Others.

V. ante. S. P. in pa. 1698.

Rex v. Storr; and pa. 1706.

Rex v. Atkins; and also

Rex v. Gillet, pa. 1707.

MR. Dunning shewed cause why an indictment should not be quashed.

Indictment for forcible entry, not shewing sufficient actual force, violence, unlawful assembly, riot or other circumstances, quashed even upon motion.

He called it an indictment for a *forcible entry*; and argued "That an indictment for a forcible entry may be maintained at common law." He cited a case in Trin. 1753, 26, 27 G. 2. B. R. Rex v. Brown and Others; and Rex v. Bathurst, Tr. 1755. 28 G. 2. S. P. *

* V. ante, pa. 1699. in margin.

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Others.

But, N. B. *This* indictment at present in question was only for (*vi et armis*) breaking and entering a *close* (not a dwelling-house,) and unlawfully and unjustly expelling the prosecutors, and keeping them out of possession.

Mr. Popham, on behalf of the defendants, objected "That this was an indictment for a *mere trespass*, for a *civil* injury; not a publick, but a *private* one; a mere entry into his *close*, and keeping him out of it." The "*force and arms*" is applied only to the *entry*; not to the expelling or keeping out of possession: *they* are only charged to be *unlawfully and unjustly*. This is no other force than the *law* implies. No actual breach of the peace is stated; or any riot; or unlawful assembly. And he cited the cases of *Rex v. Gask*; and *Rex v. Hide*; and *Rex v. Hide und Another*: (which, together with a note upon them, may be seen in the text and margin of page 1768.)

Rex v. Batbush is the only case where the objection has not been holden fatal: and that was, because it was a forcible entry into a *dwelling-house*.

Rex v. Jopson et al: Tr. 24, 25 G. 2. B. R. was an *unlawful assembly* of a great number of people. [V. ante pa: 1702, vol. 3. in the margin.]

Mr. Justice WILMOT—No doubt, an indictment will lie at *common law*, for a forcible entry; though they are generally brought on the acts of parliament. On the acts of parliament, it is necessary to state the nature of the estate; because there must be restitution: but they may be brought at *common law*.

Here the words "*force and arms*" are not applied to the whole: but if they were applied to the whole, yet it ought to be such an *actual* force as implies a breach of the peace, and makes an *indictable offence*. And this I take to be the rule, "That it ought to appear upon the *face* of the indictment to be an *indictable offence*."

Here indeed are 16 defendants. But the *number* of the defendants makes no difference, in *itself*: no riot, or *unlawful assembly*, or any thing of that kind is charged. It ought to amount to an actual breach of the peace indictable, in order to support an indictment. For, otherwise, it is only a *matter*

matter of *civil* complaint. And this ought to appear upon
the face of the indictment.

Mr. Justice YATES concurred. Here is *no* force or
violence shewn upon the face of the indictment, to make it
appear to be an *actual* force indictable: nor is any riot charged;
or any *unlawful* assembly. Therefore the mere number makes
no difference.

Mr. Justice ASTON concurred, the true rule is,
"That it ought to appear upon the face of the indictment
"to be an indictable offence.

Per Cur. unanimously,

RULE MADE ABSOLUTE,

to quash this indictment,

So that this point seems now to be fully settled.

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REE v.
BAKE and
Others.

The End of Trinity Term 1765. 5 G. 3.

Between the end of this term and the beginning of the next, viz. on Sunday the 8th of September 1765, died Sir THOMAS DENISON, late second judge of this court. Mr. Justice Denison's death.

Michaelmas Term

6 Geo. 3. B. R. 1765.

(1 Black. Rep.
563. S. P.)
Friday 8 Nov.
1765.

Action maintainable by an alien enemy, upon a ransom bill.

Ricord *versus* Bettenham.

THIS was an action brought by the captain of a *French* privateer against the captain of an *English* ship called the *Syren*, for the ransom of the *Syren*, which had been taken by the *French* privateer.

It was tried before Lord Mansfield, at Guildhall, at the sittings after Easter term 1765.

There was a special case stated, for the opinion of this court viz.

THAT it was an action brought by the plaintiff against the defendant on a *ransom-bill*: wherein the plaintiff declares, that whereas at the time of the capture aftermentioned, to wit, on the 24th day of *August* 1762, and before, there was an open war between the lord George the Third then and still king of *Great Britain*, and the *French* king; and that during the time of such open war, to wit, on the same day and year aforesaid, the said John Ricord, then being a subject of the *French* king and commander of a certain privateer called the *Badine* then cruizing upon the high seas to take the ships and effects of the subjects of the lord the present king of *Great Britain*, did, upon the high seas, in an hostile manner, attack, conquer and take a certain ship or vessel called the *Syren*, of great value, to wit, of the value of one thousand pounds, then the property of one William Templer a subject of the lord the present king of *Great Britain*, whereof the said John Bettenham was then master and commander, and then proceeding upon a certain voyage; and whereas, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, to wit, in the parish of St. Mary le Bow, in the

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the ward of *Cheap*, in consideration that the said *John Ricord* would at the special instance and request of the said *John Bettenham*, ransom and set at liberty him the said *John Bettenham* and his said ship or vessel, and grant him one month's time from that day to repair to his destined port, he the said *John Bettenham* undertook, and to the said *John Ricord* then and there faithfully promised, that he and his owners would pay to the said *John Ricord*, for the said ransom, the sum of 300 pistoles of foreign money, within two months then next ensuing; and that he the said *John Bettenham* would give for HOSTAGE *Joseph Bell* who was mate of the said ship or vessel, and would maintain the said *Joseph Bell* till the day of payment of the said ransom. And the said *John Ricord* in fact saith, that confiding in the promise and undertaking of the said *John Bettenham*, he the said *John Ricord* afterwards, to wit, on the same day and year aforesaid, at the request of the said *John Bettenham* did ransom and set at liberty him the said *John Bettenham* and his said ship or vessel; and did grant one month's time from that day to repair to his destined port. And although he did give for hostage the said *Joseph Bell* (with his own consent) to the said *John Ricord*; who afterwards and after the expiration of the said time for the payment of the ransom-money, to wit, on the 9th day of *November* in the year aforesaid, DIED, whereof the said *John Bettenham* afterwards, to wit, on the same day and year last aforesaid, had notice, that is to say, at *London* aforesaid in the parish and ward aforesaid; yet the said *John Bettenham*, not regarding his promise and undertaking so made as aforesaid, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *John Ricord* in this behalf, hath not performed his said promise and undertaking, in this, that the said *John Bettenham* and his owners did not nor did either of them, within the said two months or at any other time, pay the said 300 pistoles or any part thereof, or the value thereof in lawful money of *Great Britain*, or otherwise, to the said *John Ricord*; although the said *John Bettenham* afterwards, to wit, on the same day and year last aforesaid, at *London* aforesaid in the parish and ward aforesaid, was by the said *John Ricord* requested so to do: but to perform his said promise and undertaking in this behalf, he the said *John Bettenham* hath altogether refused, and still doth refuse; and the said ransom-money still remains wholly due and unpaid, contrary to the form and effect of the said promise and undertaking of the said *John Bettenham*. And whereas during such open war as aforesaid, to wit, on the 24th day of *August* in the said year of our Lord 1762, the said *John Ricord*, then being a subject of the *French* king and commander of a certain other ship or vessel cruising on the high seas to take the ships and

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effects of subjects of the lord the present king of *Great Britain*, did, upon the high seas, in an hostile manner, attack conquer and take a certain other ship or vessel whereof the said *John Bettenham* a subject of our lord the present king of *Great Britain* was then commander, of great value, to wit, of the value of 1000*l.* proceeding upon a certain voyage; and whereas afterwards, to wit, on the same day and year aforesaid, to wit, at *London* aforesaid in the parish and ward aforesaid, in consideration that he the said *John Ricord* had, at the special instance and request of the said *John Bettenham*, set at liberty the said *John Bettenham*, and his said last-mentioned ship, for a certain ransom, to wit, 300 pistoles, being foreign money, and had granted him one month from that day to repair to his destined port, he the said *John Bettenham* undertook, and then and there faithfully promised the said *John Ricord* to pay him the said last mentioned 300 pistoles within a certain time long since past, to wit, within two months next ensuing; yet the said *John Bettenham*, not regarding his said lastmentioned promise and undertaking, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *John Ricord* in this behalf, hath not paid the said last mentioned 300 pistoles or any part thereof, or the value thereof, to the said *John Ricord*; although so to do, the said *John Bettenham* was frequently requested, to wit, at *London* aforesaid in the parish and ward aforesaid, by the said *John Ricord*: but to pay the same or any part thereof to the said *John Ricord*, the said *John Bettenham* hath hitherto altogether refused, and still doth refuse. To which declaration, the defendant pleaded the general issue, "That he did not undertake and promise, &c": and thereupon, issue was joined. The cause came on to be heard before Lord *Mansfield*, at *Guildhall London*, the sitting after *Easter* term 1765: when it was agreed that a verdict should be given for the plaintiff; damages 236*l.* and costs 40*s.* subject to the opinion of this court upon the following facts admitted by the counsel on both sides; viz.

THAT the capture of the *Syren*, by the *Badine* privateer commanded by the plaintiff, was four leagues off *Cape Negrillo*, at sea, the 24th of *August* 1762.

THAT the plaintiff then was a natural born subject of the *FRENCH* king; from whom the *Badine* had a commission; and the defendant a natural born subject of *GREAT BRITAIN*; and that the *Syren* was the property of the defendant's owners, being *BRITISH* subjects.

THAT at the capture, a RANSOM-BILL was given, at sea, the said 24th of *August* 1762, signed by the plaintiff, the defendant, and *Joseph Bell* the defendant's mate {who was given

given as a *hostage* to the plaintiff :) which ransom-bill was in the words following, viz. "I the underwritten *John Ricord*, captain of the privateer called the *Badine* of *Port au Prince*, belonging to Mr. *Antony Burgaret*, have agreed with Mr. *John Bettenham*, captain of the *English* vessel, and taken under the said colours, of the port of *Piscatua* on the coast of *New England*, belonging to Mr. *William Temple*, at present bound from *Jamaica*, to take in her loading at *Lucca Martha Brae* in the said island, and was taken four leagues to the Northward of *Point Negrillo*; viz. That I the said *John Ricord* acknowledged to have ransomed the aforesaid captain and his said vessel called the *Syren*, for the price and sum of 300 pistoles; and have granted to the said captain one month's time to repair to his destined port, and to begin from the day of the date of these presents. And I the said *John Bettenham* oblige myself and owners to pay, within two months from the date hereof, the said aforementioned sum, and give for *hostage* my mate called *Joseph Bell*, whom I also oblige myself to maintain till the day of payment of the said ransom. In testimony whereof we have signed together; that this may be authentic, as if executed before a notary public: on board the *Badine*, this 24th of August 1762. *John Ricord. John Bettenham. Jos. Bell.*"

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THAT the value of the ransom-bill, being 300 pistoles, amounted to 236l. sterling: and that the ship *Syren* was of a greater value,

THAT the said *Joseph Bell* DIED in prison, at *Port au Prince*, on 12th October 1762.

THAT the *Syren*, after her having been so ransomed, arrived at her destined port of *Lucca Martha Brae*.

THAT at the time of the capture, and till the 3d day of November 1762, there was an ACTUAL WAR between Great Britain and France.

QUESTION—Whether, upon these facts, the plaintiff is intitled to recover in this action,

The material substance of this case is the taking of this ship by the French, in a time of open war; that the *English* captain was a natural born subject of Great Britain; and the French captain, a natural born subject of France; that the ship was taken in August 1762, and ransomed, and a ransom bill given for 300 pistoles (which are equivalent to 236l.); and that his mate *Joseph Bell* who died in prison, was given as an *hostage*.

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Mr. *Chambers* argued on behalf of the plaintiff, upon Friday the 21st of June last; and Mr. *Dunning* for the defendant.

Mr. *Chambers* begun with clearing the case of objections. It may be objected, he said (1st.) that this action is brought *coram non judice*; (2dly.) that the plaintiff is an *alien*; and (3dly.) that the *death of the hostage* puts an end to the contract.

As to the first point, he said that the want of jurisdiction ought to have been pleaded in abatement, and before imparlance: and he cited 22 H. 6. 7. pl. 9. Bro. Abr. Title *Jurisdiction*, pl. 88. and Title *Privilege* 15. and *Continuance* 70. Hardr. 365. *Clapham v. Sir John Lentball*; 1 Lutw. 46. *Wentworth v. Squib*; *Cartbew* 11. *Jennings v. Hankyn*; *Cartbew* 354. *Davis v. Stringer*; and 4 Inst. 213, 214, between Sir John Egerton and William Earl of Derby.

But after issue is joined, no exception to the jurisdiction can be allowed.

However, the jurisdiction of the court of admiralty is not exclusive of the jurisdiction of this court. They have *concurrent jurisdiction*. 4 Inst. 134.

Second point. This objection comes likewise too late now: they should have pleaded it in abatement. But an alien friend, or even an alien enemy, under some circumstances, may maintain a *personal action*. 1 Salk. 46. *Wells v. Williams*. Moore 431. *Watford v. Masbam*.

This is not an illegal contract with an enemy; but a transaction arising from an act of hostility. A captive may redeem his life by a ransom: and money actually paid down, or a promise of money to be paid in future, are equally allowable. It mollifies the rigour of conquest. It is a case of necessity. The victor might, otherwise, even kill his captive.

Third point. The contract did not become extinct by the death of the hostage. The giving of a hostage is a collateral contract. A hostage is *not an equivalent*, but a collateral security. It is only strengthening the obligation, by giving a pledge. But giving a pledge does not discharge the debt. *Yelv.* 178. *Sir Jo. Ratcliffe v. Davis*. 2 Strange 919. the *South Sea Company v. Duncombe*. 2 Salk. 522, Digest, Lib. 20. Title 5 Lex 9.

These objections being removed, no difficulty remains.

Mr.

Mr. *Dunning*, *contra*, for the defendant said, that this is an action of the first impression: no such action has ever been brought, though the case must be frequent; *nor* does a reciprocal action lie in OTHER nations.

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He proposed to consider the case, under four heads, *viz.*

- 1st. As on a *written* instrument, *without* hostage;
- 2dly. As on a *written* instrument, *with* hostage; (which he looked upon to be the material part of the engagement.)
- 3dly. Though the action might be maintainable in the admiralty-court; yet it is *not* maintainable *here*.
- 4thly. The ransom-bill was obtained under *duress*.

(But he almost gave up to the two last objections.)

First point. No such contract as this is, can, *of itself*, support an action. It is *void*, from the *condition* of the contracting parties.

The plaintiff is under an incapacity of either contracting, or suing: *not* indeed as an *alien* generally, but as an *alien enemy*. If he sued merely as an *alien*, it should have been taken in time and pleaded in abatement. But this plaintiff was an *alien enemy*. Therefore no suit could have been maintained between the parties, at the time of making the contract; nor could any suit have been maintained between the parties, at the time of the breach of the contract: and a personal action once *suspended* is gone for ever. Here is a fundamental radical defect. No action could accrue upon a contract made with an *alien enemy*, in time of actual open war.

Being an *alien enemy* is pleadable in BAR, and concludes to the action. *Co. Lit.* 129. *b.* is express in point. *Comberb.* 212, 394.

19 *E.* 4, 6. *pl.* 4. and *pl.* 6. prove that "an alien enemy" can not maintain an action." *Bro. Abr.* title *Denizen and Alien*, *pl.* 20. In *Carter* 49, 50, and 191. *Richfield et Uxor v. Udall*—"An *alien, executor*, may maintain an action; because he sues *in auter droit*." But in *Cro. Eliz.* 142. *pl.* 7. it was holden a good plea to an action of debt brought by an executor,

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executor, "That the plaintiff was an alien at Gaunt
"under the obedience of *Philip* king of Spain, enemy of the
"queen."

But it is said, "That *this*, being for a ransom, turns upon
"the necessity of the case: for, otherwise, the vanquished
"might be killed by the victor."

Answer—Allowing the contract to be prudent and even
lawful, yet it ought to be secured by an *hostage*. This is the
obvious method of securing it: and *this* contract is so secured,

Second point—This contract being so secured by a hostage,
the ransom-bill is not an independent substantive agreement;
but relative to the *hostage*. The *hostage* himself is not bound
to pay the ransom; although he has signed the paper. It is
the captain only, who obliges himself and his owners. This
obligation, if not obtained by what is strictly called *duress*,
was at least not voluntarily entered into. If the captain could
thus bind himself his ship and owners, what need could there
be of an *hostage*? The *hostage* therefore is a security, and the
principal, if not the only security.

He said, it astonished him, that all foreign writers (except
Grotius and *Puffendorff*) are silent upon this subject: and
they do not say much about it.

¶ He cited it as
section 7. but it
is the fifth
section.

But *Molloy*, lib. 1. cap. 8. § 7. says, that "if hostages
are taken, he that gives them is freed from his faith: for
"that in receiving hostages, he that receives them hath re-
"linquished from the assurance which he had in the faith of
"him that gave them."

An action upon a ransom-bill was never attempted, even
in the court of admiralty; nor will it lie in France.

But he admitted, that actions had been brought in the ad-
miralty, by the *hostage* against the owners who refused to ran-
som him; and he thought that such an action would lie even
in this court. But that will not be material in the present case.

Mr. Chambers, in reply, cited some other authorities; par-
ticularly, *Les Usages et Coutumes de la Mer*; *Guidon*, *Rachats*,
et *Compositions*; *Grotius*, lib. 3. c. 20. § 58. and c. 23. § 16.
Zouch de jure et judicio feicali, part 2. c. 54. *Ordonnances de*
Loys, 14, *touchant la Marine*: which proved, he said, that
this was a contract allowable by the law of nations. And if
the contract is allowed by the law of nations, the action must
lie in them all.

He

He made some observations in answer to Mr. *Dunning*.

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In this declaration, it only appears that the *capture* was during the war : it does not appear that the *contract* was so. Ricord v. BETTERHAM.

A right may commence, *before* the right of *suing* accrues. But supposing he could not have brought his action during the war ; yet he may in time of peace. A right may revive.

An alien enemy may sue as executor ; or for an account.

In a case in chancery, Lord *Hardwicke* over-ruled a plea of " alien enemy," pleaded by Serjeant *Kettleby*, to a bill brought for an account.

A contract made during a war may be effectuated during a peace.

It is for general convenience, that an alien enemy may be an executor. And 19 E. 4. 6. and *Brooke* title *Denizen* and *Alien*, pl. 20. are not law.

The hostage is *not* the principal security ; but *collateral*, and not the subject matter of the contract : for which, he cited *Zouch*, *Grotius*, and other authorities. But if the hostage were the principal security, yet his death does not discharge the debt.

Molloy, lib. 1. c. 8. relates to public hostages, upon leagues and treaties. Besides, other opinions are against him.

Ulterius Concilium.

Mr. *Blackstone* who was to have argued for the defendant, upon a second argument now said, he had made inquiries abroad, and had answers from very eminent lawyers of *France* and *Holland*, " That such an action had been allowed, and " upon principles that could not be disputed." Therefore he did not choose to argue it. For, the only objection which seemed to weigh, upon the former argument, was, " That " such an action would not lie in the other countries of " *Europe*,"

Lord MANSFIELD said, the COURT were all of the same opinion.

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N. B. There were a few other actions of the same kind depending: but upon this judgment (which gave universal satisfaction) the ransoms were paid.

Per Cur.—unanimously,

Let there be JUDGMENT for the PLAINTIFF.

See *Puffendorff*, lib. 8. c. 7. § 14. and
Grotius, lib. 3. c. 23. *de fide privata*
in bello.

Money et al.' *versus* Leach.

(1 Black. Rep.
555. S. C.)

Roll 60.

* V. ante,
p. 1692.

General war-
rants illegal.

† See the 549th
and 559th rolls
of C. B. of
Mich. term
4 G. 3. and be-
low, pa. 1746.
at large.

ERRORS having been assigned upon the * *bill of excep-*
ptions mentioned in page 1692, they now came on to
be argued.

This was an action of † trespass brought in the court of
common pleas by *Dryden Leach*, against three king's messen-
gers, *John Money*, *James Watson*, and *Robert Blackmore*, for
breaking and entering the plaintiff's house, and imprisoning
him, without any lawful or probable cause; to the plaintiff's
damage of 2000 l.

The defendants below pleaded two pleas. The first was
the general issue, "Not guilty". on which issue was joined.

The other plea (pleaded by leave of the court) was a spe-
cial justification, as to the breaking and entering of the plain-
tiff's dwelling-house, and staying and continuing therein for
six hours, and making the assault upon him, and seizing tak-
ing and imprisoning him, and keeping and detaining him in
prison for four days: as to all which, they say, that before
the committing of the supposed trespass, *viz.* on 19th April
1763, the king made a speech from the throne &c. in which
speech was contained the following declaration &c. &c. That
on 23d April 1763, a certain seditious and scandalous libel
or composition, intitled "The North Briton No. 45." was
unlawfully and *seditiously* composed printed and published
concerning the king and his said speech; in which libel were
contained &c. &c. &c. That the Earl of *Halifax* was then
one of the privy council, and one of his majesty's principal
secretaries.

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Secretaries of state; and that information was given to him of the said publication of the aforesaid libel; and the said libel was then shewn and produced to the said earl: and he thereupon in due manner issued his WARRANT in writing under his hand and seal, directed to *Nathan Carrington* and these three defendants who were then four of his majesty's messengers in ordinary; by which warrant, the said earl did in his majesty's name authorize and require them, taking a constable to their assistance, to make strict and diligent search for the said authors printers and publishers of the aforesaid seditious libel intituled "The North Briton No. 45. April the 23d. 1763;" and them or any of them having found, to apprehend and seize, together with their papers, and to bring in safe custody before the said earl, to be examined concerning the premises, and to be further dealt with according to law: in the due execution whereof, all mayors, sheriffs, justices of the peace, constables, and all others his said majesty's messengers, officers civil and military, and loving subjects whom it might concern, were to be aiding and assisting to them the said *Nathan Carrington, John Money, James Watson, and Robert Blackmore*, as there should be occasion. They further say, that for 44 weeks and upwards before the issuing of the said warrant, certain weekly compositions intituled "The North Briton," and respectively numbered in a progressive order, had been printed and published on *Saturday* in every week; and that the said seditious libel intituled "The North Briton No. 45, Saturday April the 23d. 1763," was one of the said weekly compositions. They say that the plaintiff followed and exercised the art and business of a printer; and did in fact print and cause to be printed one of the said weekly compositions intituled the "North Briton"; to wit, the North Briton No. 26, and that after the issuing of the aforesaid warrant and before the committing of the said supposed trespass, to wit, on 27th April 1763, information was given to them the defendants, "That the said *Dryden Leach* and his servants were the printers of the aforesaid seditious libel intituled "The North Briton No. 45. Saturday, April the 23d. 1763." Whereupon the defendants, being his majesty's messengers in ordinary as aforesaid took to their assistance a certain constable, to wit, one *Thomas Freeman*, who was then a constable of the parish of *St. Margaret, Westminster*, in the county of *Middlesex*, to aid them in the execution of the aforesaid warrant; and, together with the said constable, entered into the aforesaid dwelling-house of the said *Dryden Leach*, in which the said *Dryden Leach* carried on his aforesaid business of a printer, the door thereof being then open, to search for the printers of the said seditious libel, in order to carry them before the said earl of *Halifax*, to be examined concerning the same: and thereupon, the said defendants,

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defendants, together with the constable aforesaid, did then and there find, within the same house, a *newly-printed* copy of one of the said weekly compositions intitled "The North Briton", and also an *unfinished* copy of part of another of the said compositions then also *newly printed*, and which said newly printed copies were part of a *new edition*, which the said *Dryden Leach* and his servants were then and there *re-printing*, of the aforesaid weekly compositions. Whereupon, the defendants, together with the constable abovenamed, did gently lay their hands on the said *Dryden Leach*, and seized and took him into their custody, in order to bring him before the said earl of *Halifax*, to be examined concerning the said seditious libel; and in so searching for the printers of the seditious libel, and seizing and taking the said *Dryden* as aforesaid, did then and there necessarily stay and continue in the said house of the said *Dryden* for the space of six hours, part of the time in the declaration mentioned. And because the said earl of *Halifax* was, during all the said space of four days, part of the aforesaid five days in the said declaration mentioned, employed in other business belonging to his said office of secretary of state, so that the said *Dryden Leach* could not then or during the said four days be brought before the said earl for the purpose aforesaid, they the said defendants, together with the constable aforesaid, did keep and detain the said *Dryden Leach* in their custody for the said space of four days, part of the said time in the declaration mentioned, in order to carry him before the said earl of *Halifax* for the purpose aforesaid. They further say, that at the end of the aforesaid four days, and not before, upon the examination of the said *Dryden Leach* and certain other persons who were then and there examined concerning the premises, it appeared to the said earl of *Halifax*, "That the said *Dryden Leach* did not print the said seditious libel intitled the "North Briton No. 45. Saturday April the 23d. 1763." and thereupon, the said defendants, by the command of the said earl of *Halifax*, did then and there *release* the said *Dryden Leach* out of their custody, and discharged and set him free from that imprisonment. Which are the same breaking and entering of the aforesaid dwelling-house of the said *Dryden Leach*, in the declaration mentioned, in which &c. and staying and continuing therein for the space of six hours, part of the time in the same declaration mentioned; and also as to the making of the aforesaid assault upon the said *Dryden Leach*, and seizing taking and imprisoning of the said *Dryden Leach* and detaining him in prison for the space of four days, part of the said time in the said declaration mentioned, above supposed to have been done by the defendants, whereof the said *Dryden* hath above complained against them. And this they are ready to verify. Wherefore they pray judgment, if

the said *Dryden* ought to have or maintain his aforesaid action thereof against them &c.

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The plaintiff replied, as to the said plea in bar as to the breaking and entering the dwelling-house, and staying and continuing there six hours (part of the time in the declaration mentioned,) and also as to the making of the assault upon him, and seizing taking and imprisoning of him, and keeping and detaining him in prison for four days (part of the time in the declaration mentioned;) that the defendants, of *their own wrong* and *without the cause* by them in their plea alleged, broke and entered his dwelling-house, and staid and continued therein for six hours and made an assault upon him, and seized took and imprisoned him, and kept and detained him in prison for the four days in the plea mentioned (part of the time in the declaration mentioned,) in manner and form as he has above complained against them. And upon this issue was joined.

The cause came on to be tried before Ld. Ch. Just: Pratt on the 10th of December 1763; at *Guildhall*: and the jury found a verdict for the plaintiff upon both issues; and gave him damages 400*l.* besides his costs and charges &c. On 16th June 1764, judgment was signed for the plaintiff, for 400*l.* damages, and 5*l.* 16*s.* 8*d.* costs.

At the trial, a bill of exceptions was tendered and received; which stated the issues, the coming on to trial &c. and the evidence, and described a printed paper intitled "The North Briton No. 45." and the information given thereof to the secretary of state, and his warrant to the defendants below, together with another king's messenger, *Nathan Carrington*; and what Mr. *Carrington* had been told of Mr. *Leach*'s being the printer of it; and their thereupon entering his house, and finding some of the other numbers of the same paper newly printed by him; and their thereupon taking him into custody, in order to carry him before the earl of *Halifax*, one of his majesty's principal secretaries of state; and that he, appearing *not* to be either author, printer or publisher of the said paper called "The North Briton," No. 45. was discharged by them; by the earl's order, without being ever carried before him. They say, that their evidence intitled them to the benefit of the statute of 24 G. 2. c. 44. Though it was denied by the counsel for the plaintiff *Leach*, that either they or the secretary of state himself were within that statute, or those of 7 Jac. 1. c. 5. or 21 Jac. 1. c. 12. (the former of which, being only temporary, was made perpetual by the latter, and by which liberty is given to *justices of peace* and all others acting under *their* command "To plead the general issue, and give the special matter in evidence.")

That

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That the chief justice of the *common pleas* was of opinion
 " That their evidence was *not* sufficient to bar the plaintiff of
 " his action": whereas, the bill of exceptions insists that it
 " was."

This bill of exceptions being sealed, and the seal acknowledged as is beforementioned, the defendants below assign errors: and a joinder in error was put in by the plaintiff *Leach*.

The assignment of errors was to the following effect: (It may be seen at large, in the 60th Roll of *Easter* term 5 G. 3. B. R.)

The defendants come, on *Wednesday* next after 15 days of *Easter* 4 G. 3. before our lord the king at *Westminster*, and say, that at the trial, their counsel proposed *exceptions* to the opinion of the lord chief justice *Pratt*; which exceptions were written in a bill, and sealed by the chief justice: which bill of exceptions the defendants now bring into this court, and pray a writ to the chief justice, to confess or deny his seal; which writ is granted to them, returnable on the morrow of the *Ascension*. At which day, before our lord the king at *Westminster* come the defendants in their proper person, and the said chief justice of the *common pleas* likewise in his proper person, and acknowledges his seal put to the said bill of exceptions. [The form and ceremony of his doing this may be seen in page 1692.] Then they set out the bill of exceptions, *verbatim*, " Be it remembered &c." It recites all the proceedings particularly and minutely, from the very beginning, to the end, concluding with the verdict of the jury: which it would be tedious to repeat, as they have been already sufficiently specified. They are entered upon the Rolls 549 and 550 of the court of *common pleas*, in *Michaelmas* term 4 G. 3. The defendants (now become plaintiffs in error) then alledge, (in their said bill of exceptions) that upon the trial, the counsel for the plaintiff *Leach*, in order to prove the defendants guilty of the trespass, gave in evidence, " That on 29th *April* 1763, the defendants entered the plaintiff's dwelling-house, searched it, and continued in it four hours; seized and took *Leach* into their custody against his will and consent; and kept and detained him in their custody against his will and consent for four days:" which was all the trespass assault and imprisonment committed by the defendants or any of them. Whereupon their counsel, in order to bar the said action, and to acquit them thereof under the general issue above pleaded, gave in evidence and proved " That before the committing of the " trespass, the king made a speech from the throne, &c,

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" containing the several expressions stated in the second plea
 " of the defendants; and that afterwards and before the
 " supposed trespass, a paper intituled " The North Briton
 " No. 45. &c. was printed and published; and that the
 " same contained the several matters set forth in their said
 " second plea:" and it was proved on their behalf, " That
 " the earl of *Halifax* was, all that time, one of his majesty's
 " principal secretaries of state, and one of the privy coun-
 " cil; and that information was given to him of the said
 " publication of the abovementioned paper; and the same
 " was then shewn to him; and that thereupon the said earl
 " issued his warrant in writing under his hand and seal di-
 " rected to *Nathan Carrington* and the defendants, who
 " were then four of his majesty's messengers in ordinary."
 And their counsel then produced and gave in evidence the
 warrant aforesaid, which was in the words and figures fol-
 lowing, that is to say, " *George Montagu Dunk*, earl of
 " *Halifax*, viscount *Sumbury* and baron *Halifax*, one of the
 " lords of his majesty's most honourable privy council, lieut-
 " enant-general of his majesty's forces, and principal secre-
 " tary of state &c.—These are in his majesty's name to au-
 " thorize and require you, taking a constable to your assist-
 " ance, to make strict and diligent search for the authors
 " printers and publishers of a seditious and treasonable paper
 " intituled the North Briton No. 45. Saturday April 23. 1763.
 " printed for *G. Kearsley* in *Ludgate-street London*; and them
 " or any of them having found, to apprehend and seize, toge-
 " ther with their papers, and to bring in safe custody before
 " me, to be examined concerning the premises and further
 " dealt with according to law. In the due execution where-
 " of, all mayors, sheriffs, justices of the peace, constables,
 " and all other his majesty's officers civil and military, and
 " loving subjects whom it may concern, are to be aiding and
 " assisting to you, as there shall be occasion. And for your
 " so doing, this shall be your warrant. Given at *St. James's*,
 " the 26th day of *April* 1763, in the third year of his ma-
 " jesty's reign. *Dunk Halifax*. To *Nathan Carrington*,
 " *John Money*, *James Watson*, and *Robert Blackmore*, four
 " of his majesty's messengers in ordinary." And it was fur-
 " ther proved on behalf of the said defendants, " That several
 " of the like warrants had been granted, at different times
 " from the time of the revolution to the present time, by the
 " principal secretaries of state, and had been executed by the
 " messengers in ordinary, for the time being; and that the
 " paper in the said warrant described was the said paper so
 " printed and published as aforesaid; and that the warrant
 " aforesaid, before the committing of the supposed trespass,
 " to wit, on the 26th day of *April* aforesaid in the year of
 " our Lord 1763, was delivered to the defendants, to be
 " executed;"

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LEACH.

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“ executed ” and “ That they were then three of his ma-
 “ jesty’s messengers in ordinary and still are so.” It was also
 “ proved, on their behalf, that for forty weeks “ and up-
 “ wards, next before the issuing of the aforesaid warrant,
 “ certain weekly compositions intituled *The North Briton*
 “ had been printed and published on *Saturday* in every week;
 “ and that the aforesaid paper intituled *The North Briton*
 “ No. 45 *Saturday April 23, 1763*, described in the said
 “ warrant, being one of the said weekly compositions, wa
 “ printed and published before the issuing of the said war-
 “ rant, to wit, on the 23d day of *April 1763*; and that
 “ after the issuing of the abovementioned warrant, and be-
 “ fore the committing of the said supposed trespass, to wit,
 “ on the 28th day of *April* in the year aforesaid, the de-
 “ fendants were informed by *Nathan Carrington*, one other
 “ of the messengers in the said warrant named and one of
 “ the persons to whom the said warrant was directed, that
 “ from the information he had received he was of opinion
 “ that the said *Dryden Leach* who then and long before was
 “ and still is a printer in the city of *London* aforesaid, was
 “ the printer of the said weekly compositions intituled *The*
 “ *North Briton*; for that he the said *Carrington* had been in-
 “ formed that one *Mr. Wilkes*, a person supposed to be the
 “ author of the said weekly compositions, had been seen fre-
 “ quently to go into the said *Mr. Leach’s* house, and that an
 “ old printer, whose name he the said *Carrington* did not
 “ mention to the defendants, had told him that the said *Mr.*
 “ *Leach* was the printer of the said compositions; and that
 “ thereupon the defendants took to their assistance a constable,
 “ and with the constable entered *Leach’s* dwelling-house (the
 “ door being open) to search for the said *Leach* and his books
 “ and papers, and to bring him together with his books and
 “ papers in safe custody before the said earl of *Halifax*, to be
 “ examined concerning the premises, and to be further
 “ dealt with according to law; and upon that occasion did
 “ search the said house, and necessarily continued therein for
 “ the said space of four hours.” And it was further given
 “ in evidence and proved, on the part of the said defendants,
 “ That upon that search, the defendants did find *Leach* in
 “ the said house, and did also then find a newly-printed sheet,
 “ containing a copy of one of the said weekly compositions,
 “ intituled *The North Briton* No. 1. and part of a copy of
 “ another of the said weekly compositions, intituled *The*
 “ *North Briton* No. 2: which sheet was printed by the said
 “ *Dryden Leach*.” And it was further proved, “ That the
 “ said *Dryden Leach* did also print one of the said weekly
 “ compositions, intituled *The North Briton* No. 26. And
 “ the defendants, with the assistance of the constable, did
 “ seize and take into their custody the said *Dryden Leach*, in
 “ order

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“ order to bring him in safe custody before the said earl of
 “ *Halifax*, to be examined concerning the premises; and
 “ on that occasion did keep and detain him in their custody
 “ for the space of four days; at the end of which time, it
 “ appearing by the examination of divers persons then taken,
 “ touching the author printer and publisher of the said pa-
 “ per, that the said *Dryden Leach* was not the author printer
 “ or publisher thereof, the defendants, by the command of
 “ the said earl of *Halifax*, released and discharged him from
 “ that imprisonment: but the said *Dryden Leach* was never
 “ carried before or examined by the said earl of *Halifax*. And
 “ that the entering the house of the said *Dryden Leach*, and
 “ searching the same, and taking into and detaining in their
 “ custody him the said *Dryden Leach* in the manner and on
 “ the occasion herein before stated, were the whole of the
 “ trespass assault and imprisonment committed by the said
 “ defendants or any of them.” But it was proved on the
 “ part of the said *Dryden Leach*, “ That he was not the author
 “ printer or publisher of the said paper intitled *The North*
 “ *Briton* No. 45. in the said warrant mentioned, nor of any
 “ other numbers of the said weekly compositions, except as
 “ before stated.” Whereupon the counsel for the defend-
 “ ants insisted before the said chief justice; that the said several
 “ matters so produced and given in evidence on their part as
 “ aforesaid were sufficient and ought to be admitted and allowed as
 “ decisive evidence to intitle them to the benefit of the statute of
 “ 24 G. 2. intitled “ An act for rendering justices of the peace
 “ more safe in the execution of their office, and for indemnify-
 “ ing constables and others acting in obedience to their war-
 “ rants;” and that therefore the said *Dryden Leach* ought to
 “ be barred of his aforesaid action, and the said defendants ac-
 “ quitted thereof. And thereupon the said defendants, by
 “ their counsel aforesaid, did then and there pray of the said
 “ chief justice to admit and allow the said matters and proof so
 “ produced and given in evidence for the said defendants as
 “ aforesaid, to be conclusive evidence to intitle the said defend-
 “ ants to the benefit of the statute aforesaid, and to bar the said
 “ *Dryden Leach* of his action aforesaid. But to this, the
 “ counsel for the plaintiff then and there insisted before the chief
 “ justice, that the matters and evidence aforesaid so produced
 “ and proved on the part of the defendants as aforesaid, were
 “ not sufficient, nor ought to be admitted or allowed to intitle
 “ the said defendants to the benefit of the statute aforesaid, or
 “ to bar the said *Dryden Leach* of his aforesaid action; and that
 “ neither the said defendants or any of them, nor the said earl
 “ of *Halifax*, were or was within the words or meaning of the
 “ statute made in the seventh year of his late majesty king
 “ *JAMES the First*, intitled “ An act for ease in pleading
 “ against troublesome and contentious suits prosecuted against
 “ justices

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" justices of the peace, mayors, constables, and certain
 " other his majesty's officers for the lawful execution of their
 " office;" nor of the statute made in the *twenty-first* year of
 the reign of the *same late king*, intituled " An act to enlarge
 " and make perpetual the act made for ease in pleading
 " against troublesome and contentious suits, prosecuted
 " against justices of the peace, mayors, constables, and cer-
 " tain other his majesty's officers, for the lawful execution
 " of their office, made in the 7th year of his majesty's most
 " happy reign;" nor of the said statute made in the *twenty-*
fourth year of the reign of his late majesty king GEORGE the
Second; nor in any wise intituled to the benefit of any of those
 statutes. AND the counsel for the said *Dryden Leach* further
 insisted, that the seizure and imprisonment of the said *Dryden*
Leach were not made and done *in obedience to the said warrant*;
 nor had the said defendants or any of them, in that behalf,
any authority thereby. AND the said *chief justice* did then and
 there declare and deliver his *opinion* to the jury aforesaid,
 " That the said several matters so produced and proved on
 " the part of the defendants were *not*, upon the whole case,
 " sufficient to bar the said *Dryden Leach* of his aforesaid
 " action against them"; and, *with that opinion*, left the
 same to the said jury. WHEREUPON the said counsel for the
 said defendants, did then and there, on behalf of the said de-
 fendants, *except* to the aforesaid opinion of the said chief jus-
 tice; and insisted on the said several matters and proofs as
 an *absolute bar* to the aforesaid action, by virtue of the last
 mentioned statute. AND inasmuch as the said several mat-
 ters so produced and given in evidence on the part of the said
 defendants, and by their counsel aforesaid objected and in-
 sisted on as a bar to the action aforesaid, *do not appear by the*
record of the verdict aforesaid, the said counsel for the aforesaid
 defendants did then and there *propose their aforesaid excep-*
tion to the opinion of the said chief justice, and requested the
 said chief justice to *put his seal* to this BILL of exception con-
 taining the said several matters so produced and given in evi-
 dence on the part of the said defendants as aforesaid, accord-
 ing to the form of the statute in such case made and pro-
 vided: and thereupon the aforesaid chief justice, at the re-
 quest of the said counsel for the abovenamed defendants, *did*
put his seal to this bill of exception, pursuant to the aforesaid
 statute in such case made and provided, on the tenth day of
December aforesaid, in the said fourth year of the reign of his
 said present majesty.

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AND HEREUPON the said *John Money*, *James Watson*, and
Robert Blackmore say, that in the record and proceedings
 aforesaid

aforesaid and also in the matters recited and contained in the said bill of exceptions, and also in giving the verdict upon the said issue between the parties aforesaid first above joined, and also in giving the judgment aforesaid, there is manifest error, in this, that the said chief justice before whom &c, at and upon the trial of the said issue between the parties aforesaid first above joined, did declare and deliver his opinion to the jury aforesaid, "That the said several matters mentioned in the said bill of exceptions, and so as aforesaid produced and proved on the part of the said John Money, James Watson, and Robert Blackmore, were not, upon the whole of the case, sufficient to bar the said Dryden Leach of his action aforesaid against them"; and, with that opinion, left the same to the jury. There is also error in this, that by the record aforesaid it appears that the verdict aforesaid was given upon the said issue first above joined, for the said Dryden Leach, against them the said John Money, James Watson, and Robert Blackmore: whereas, by the law of the land, the verdict on that issue ought to have been given for the said John Money, James Watson and Robert Blackmore against the said Dryden Leach. There is also error in this, that it appears by the record aforesaid, that judgment in form aforesaid was given for the said Dryden Leach against them the said John Money, James Watson, and Robert Blackmore: whereas, by the law of the land, the judgment aforesaid ought to have been given for them the said John Money, James Watson, and Robert Blackmore, against the said Dryden Leach. AND the said John Money, James Watson and Robert Blackmore pray that the judgment aforesaid, for the errors aforesaid, and others in the record and proceedings aforesaid, may be reversed annulled and altogether had for nothing; and that they may be restored to all which they have lost by occasion of the judgment aforesaid &c.

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AND HEREUPON, the said Dryden Leach, in his proper person, voluntarily comes here into court, and prays leave to rejoin to the errors aforesaid, before our lord the king, until on the morrow of the Holy Trinity, wheresoever &c: and he hath it &c. The same day is given to the said J. M. J. W. and R. B. At which day come the parties aforesaid in their proper persons: and the said Dryden Leach says "That there is not, either in the record and proceedings aforesaid, or in the matters recited and contained in the said bill of exceptions, or in giving the verdict aforesaid, or in the judgment aforesaid, any error;" and prays that the court here may proceed to the examination as well of the record and proceedings, as of the matters aforesaid above assigned for error; and that the judgment aforesaid may be affirmed in all things.

1765. THIS CASE was first argued on Tuesday the 18th of June last, by Mr. Solicitor General *De Grey* for the plaintiffs in *Money et al. v. error*; and by Mr. *Dunning*, for the defendant in error.

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Mr. *De Grey* divided his argument into three points.—

1st. The defendants had a right to plead the general issue, and to give the special matter in evidence, under 7 Jac. 1. c. 5; or, in other words, Lord *Halifax*, the secretary of state, was a justice of peace, within the intention of that act.

2dly. The evidence was sufficient to intitle the defendants to a verdict. Which will take in both the validity of the warrant itself, and the manner of executing it.

3dly. They were also intitled to a verdict within the meaning of 24 G. 2. c. 44. the plaintiff not having observed the terms required by it.

First point—Before the statute of 7 Jac. c. 5. a matter of special justification could not be given in evidence by a justice of peace, upon the general issue pleaded by him.

The question is—Who were meant, in that act of parliament, by justices of the peace.

Some persons were, from ancient times, so, by office; some are so by special commission; some, by corporation-charters; some, by tenure; some, by prescription.

In the time of *Edward the Third*, other persons were authorized to act within particular districts.

But the great officers of state had the jurisdiction, as incident to their offices. So had, in some degree, coroners and other inferior officers,

The secretaries of state must have had it as incident to an office so ancient as to be co-æval with the crown itself,

• V. Artic.
Super Chartas,
28 E. 1. c. 6.

A statute in *Edward the First's* reign says "Desouth le petit seale, ne issira desormes nul briefe que touch le comon ley." And Lord *Coke*, in his comment upon it, in his 2 Inst. 556. calls it the signetum, the king's signet, which at the making of that statute the king had; and says—"This seale is

"is ever in the custody of the principal secretary: and there be four clerks of the signet attending on him."

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This seal is as ancient as the crown; and the officer that keeps it, as ancient as the seal itself: and he is an officer well known, and recognized by many acts of parliament; and the king's warrants are countersigned by him.

In cases of *treason*, and of *felony*, the courts of law recognize his authority: and there is equal reason for it, in cases of *misdemeanour*; which equally affect government, and disturb the public peace.

A *seditious libel* is an offence against government and the public peace; and effectually undermines government.

A Secretary of State is a centinel for the public peace: it is his duty to prevent the violation of it, and to bring the offenders to justice; and it is necessary that he should be invested with this power, in order to enable him to execute this his duty.

The case of *Rex v. Kendal and Roe*, 1 Salk. 347.* has settled this point, as to treason: for, it was there holden "That secretaries of state might commit for suspicion of treason, as conservators of the peace did at common law; and that it was incident to the office, as it is to the office of justices of peace, who do it *ratione officij*." And the commitment to a messenger was there holden good.

* V. 5 Mod.
78. S. C. and
State Trials,
Vol. 4. p. 854.
and Comberb.
343. Holt 144.
Skinner 596.
and 12 Mod. 82.

In the case of the *Queen v. Derby*, B. R. 1709. 10 Ann.† for publishing a scandalous and seditious libel called the Observer—the two points abovementioned were admitted by Mr. Lechmere, who was counsel for the defendant. He agreed the power of a secretary of state to commit for treason or felony; and that a messenger was a proper officer. And in that case, the court held the warrant good and legal.

† Fortescue's
Rep. 140.

In the case of *Rex v. Earbury*, M. 7 G. 2. 1733, who was arrested and committed by warrant from a secretary of state; and his papers seized, which he applied to have restored; Lord Hardwicke held that they could not be restored, in a summary way, on motion. The warrant there was "To search for the papers and to bring the author before the secretary of state."

The statute of 1 E. 3. enacts, "For the better keeping, and maintenance of the peace, good men and lawful shall in every county be assigned to keep the peace." So, 4 E. 3. c. 2.

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c. 4. § 2. and
Stat. 2, c. 1.

The 18 E. 3. *stat. 2. c. 2.* is the first statute that gives the judicature of hearing and determining. 34 E. 3. c. 5. enlarges their powers. The 2 H. 5. c. 4. † calls them by the express name of "*Justices of the peace.*" Their commission impowers them to keep the peace; and also contains a *distinct* clause "To hear and determine."

Therefore, the *old conservators of the peace still remain*: they have also power to hear and determine as justices. They are wardens of the peace too, by their commission, as well as by common law: and they may likewise by the common law, without any special commission or warrant, use force to suppress rebels. For which last assertion, he cited *Kelyng* 76.

The statute of 7 Jac. 1. c. 5. (about pleading the general issue, means to protect *all* that act as conservators or wardens or justices of the peace, as well as those that act under special commissions.

The act of 2 Ph. & M. c. 18. (relating to corporation-justices) calls them "*Commissioners for the conservation of the peace.*" Justice of peace is not a strict technical name: they may be called *custodes pacis*. In 2 Rol. Abr. 95. title, *Justices de Peace*, it is said, "That an indictment taken before them, naming them *Custodes pacis*, and not *justices of the peace* (as the statute names them) is a good indictment: for, it is all one." It is not material *how* the appointment is made. The statutes mean to include *all* conservators of the peace: they may *all* now plead the general issue, and give the special matter in evidence. The act of 7 J. 1. c. 5. does not indeed extend to any justices sitting *in sessions*: it only extends to them in their *single jurisdiction*.

The statute of 11 H. 6. c. 6. "That suits and processes before justices of the peace shall not be discontinued by new commissioners," is no exception to this rule: neither is 2 H. 5. *stat. 1. c. 4. § 2.* "That justices of the peace of the quorum shall be resiant in their shire; (except lords named in the commission, &c, &c.)"

Acts of parliament shall be taken with *latitude*, and extended to cases within the *same reason* and calling for the *same remedy*. *Plowd.* 366. *Ld. Zouch's case.* *Co. Litt.* 24. b. 10 *Co.* 101. b. *Beaufage's case.* *Plowd.* 147. *Ilfon v. Studd.* *Plowd.* 36. *Platt v. the sheriffs of London.* *Bro. Parliament* 20. *Wentworth's office of Executors* 67. *Sir T. Jones* 62. *Plummer v. Whitcomb.*

The rule about "Several particulars of an inferior nature being enumerated, excluding those that are of a higher nature and not enumerated," will not hold here. This act is not done as a higher officer; but only as a justice of peace. The bishop of *Norwich* being named extended to all bishops; so the warden of the *Fleet* being named, extends to all gaolers. In *Moore* 845. *Phelps v. Winobcombe*, it was resolved "That a deputy constable may, by the equity of the statute of 7 J. 1. c. 5, plead the general issue."

Persons acting for preservation of the public peace ought to be protected: and these old conservators of it are more reasonably intitled to protection, than other persons are.

Second point—If the special matter may be given in evidence, then the question will be "Whether this matter given in evidence would, if it had been pleaded, amount to a justification."

It is objected, "That the warrant is not legal; and that it was ill executed."

1st. As to the warrant itself—No such action has ever been brought upon these warrants, by persons apprehended by virtue of them: or, at least, there is none upon record.

It is said, "That this warrant is too extensive in the description of the person: and that it has been abused."

Answer—The power is not illegal: and the abuse of it is no objection to the warrant itself. Such warrants are agreeable to long practice and usage.

Whatever the present determination may be, in point of law, it will be in the breast of the legislature to set it right.

In the *Bewdley* case, reported 1 *Peere Williams* 207. (*Regina v. Ballivos &c of Bewdley*) a construction of an act of parliament contrary to the words of it was allowed, founded upon only seven years practice. In *Comberb.* 342. *The India Company v. Skinner*—where the warrant was granted before any default; *Holt* said, "That the practice having been, in case of taxes, to grant a conditional warrant to distrain, *communis error facit jus.*"

The power of justices of peace "To commit before indictment," stands supported only by practice and usage. In 6 *Mod.*

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6 Mod. 178. *Regina v. Tracy*, Holt Ch. J. says, formerly, none "Could be taken up for a misdemeanor, till indictment found: but now the practice all over England is otherwise." And *per Hale*, "That practice is become a law." So likewise has usage and practice established accustoms, *quo minus*, new trials, &c.

The greatest judges have bailed persons taken up upon these warrants; and they have not been objected to, by either courts, or counsel of the greatest eminence: whereas, if they were not legal, the persons apprehended upon them ought to have been discharged. For which he cited, 1 *Hale's Hist. P. C.* 578. The court will not make orders upon illegal warrants: consequently, they saw no objection to them. Even the greatest friends to the revolution have not objected to these warrants. From whence, it must be inferred, that no objection lies against them.

On 6 July 1641, in the case of Sir John Elliot, &c. The house of commons resolved, that it was a breach of privilege: but they did not vote it illegal.

Lord Hardwicke, in *Earbury's* case, only said "He would not then determine it."

In *treason*, it will scarce be objected to; nor in *felony*.

In Miss *Blandy's* case, her bureau was broken open; and her papers seized; and given in evidence.

Indecent prints or books may be seized by a magistrate: and they often have been so.

Evidence taken from felons or other criminals may be produced against them; though a criminal shall not be compelled to produce such evidence against himself.

It is said "That this warrant is illegal, because it is general to take up the author, printer, or publisher." But it is legal to issue and execute a warrant against a person unknown, but only described. Indeed the magistrate issues it, and the officer must execute it, at their peril. And though the warrant includes seizing the papers, yet that part of it has not been executed: and the bare insertion of it shall not affect the officer who executed the other part of the warrant.

The facts are these—A warrant was directed to four messengers: *Carrington*, one of them, is informed "That *Leach*"

"was

"was the printer; and that the reputed author was frequently at *Leach's* house." The other three act on this information. And this information was not groundless: for, they found a sheet of another number, wet and just printed. They take him up, and carry him to Lord *Halifax's* office; who was not then at leisure to examine him: but when he did examine him (four days after,) he discharged him. Here was *probable cause* for taking him up.

A justice of peace having jurisdiction, may grant a proper warrant on probable cause: and ministerial officers (constables &c.) are not to be affected by the illegality of the warrant, in other parts of it. This warrant was executed honestly, and upon a probable cause.

Third point—The plaintiff's action is sufficiently barred by 24 G. 2. c. 44. for want of observing the terms required by it. They neither proved *notice*, as the 3d section requires; nor made the *demand* required by the 6th section.

The defendants have acted in obedience to the warrant of a magistrate who is a justice of peace within the meaning of this act; and by his order, and in his aid.

The only doubt is, "Whether the action is brought for any thing done in obedience to the warrant; or not."

The defendants have obeyed it to the best of their power.

However, as they have acted *under colour* of the warrant, meaning to obey it, they are not answerable, although they may have erred in the execution of it. They are protected by this act, if they have acted *bonâ fide*; even though the warrants and the execution be illegal. They are not to judge of arduous points of law: the statute means to protect them from it.

2dly. The previous step to bringing this action was not taken; viz. the demanding a perusal and copy of the warrant, and shewing a refusal of it.

If there was a fault, or negligence, or mistake in this proceeding, the fault was in the magistrate: there was none in the officer who executed it. And the requisite steps have not been taken, in order to maintain the suit.

Therefore the plaintiff is barred of this action.

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Mr. Dunning, *contra*—for Mr. Leach, the plaintiff below.

The first question is “Whether this be a case within 24 G. 2. c. 44.” which question will involve the question “Whether it be within the acts of 7 J. 1. c. 5. or 21 J. 1. c. 12.”

All these statutes, being in *pari materia*, must receive the same construction: and they are all unapplicable to the present case.

He then made three sub-divisions of his first question: *viz.*

1st. Whether Lord *Halifax*, being Secretary of State, is a conservator or justice of peace within the true intent and meaning of the act of 24 G. 2. c. 44.

2dly. Whether the defendants are constables, headboroughs, or officers &c, within the intent and meaning of that act.

3dly. Whether this action is brought and properly pursued within the true intent and meaning of it; and for a matter done in obedience to the warrant.

First point—Lord *Halifax* is not a justice of peace within 24 G. 2. He is not so by commission: he is not so, as incident to his offices, either of secretary of state, or of privy councillor.

But it has been said “He is a conservator of the peace; and therefore within the meaning of the act.”

I deny the principle, and also the conclusion. I admit the case of *Rex v. Kendal and Roe*; though the reasons of it do not appear: but I submit to the authority of it, “That a secretary of state has a power to commit for high treason.”

Serjeant *Hawkins*’s reasons do not support his assertion: and I deny that a secretary of state is a conservator of the peace. He has only a power of committing for high treason, as conservators of the peace had in other cases: and *Kendal and Roe*’s case carries it no farther. The court never meant to resolve any thing further.

All the crown-writers are silent on this subject of a secretary of state’s having this jurisdiction. None of them even hint

hint that a secretary of state is a conservator of the peace. Staundford, Fitz-Herbert, Lambard, &c, say no such thing.

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V. Lib. 2. c.

3.

Lib. 2. c. 2.

§ 2.

* Lambard gives the list of those officers who are conservators of the peace: but there is no mention therein, of secretaries of state. Serjeant + Hawkins copies the same list, without adding secretaries of state.

There is no proof or pretence that the conservatorship of the peace is incident to their office: nor is there any usage, to support such a notion. Their claim of a power to grant such warrants as the present one, is not pretended to be older than the revolution.

If they were justices of the peace or conservators of the peace, they would be bound to execute the powers given to justices, or residing constables; and they would be subject to the control of this court.

The offices are different in creation, constitution, and execution.

The very language of the warrant shews that the secretary of state did not consider himself as a justice, conservator, or constable.

This statute is not to be extended beyond the letter of it: it is not within the maxims or reasons of extension of acts of parliament.

It is necessary to consider the former statutes of 7 J. 1. c. 5. and 21 J. 1. c. 12: (both of which he rehearsed and observed upon.)

In these, there is no mention of secretaries of state: nor is there any reason to add others not there enumerated; the rather, as the enumeration begins with persons inferior to secretaries of state. Neither is there any ground to imagine that the legislature intended to include secretaries of state within their provision: the preamble shews rather the contrary. The line drawn between those enumerated and those omitted, shews the same thing. The persons intended to be protected, are persons bound to act, and acting for the public good, without reward; not great officers with great salaries, who are not lawyers and are not bound to act.

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The persons introduced by the second act (churchwardens, sworn-men, overseers, &c.) are persons within the mischief of the former: yet even they were not virtually included in the former, and are therefore particularly named in the latter.

This latter explanatory act omits, nevertheless, to name secretaries of state. But constables are within the letter: and it extends to no others. And he referred 4 Inst. 175. and the two marginal notes there; one on 7 J. 1. c. 5. and the other on 21 J. 2. 12.

From all which premises he argued that these acts of Jac. 1. are not to be extended beyond the letter: and if they were, yet there is no reason to extend them to secretaries of state, as not being within the same inconvenience.

No more reason is there to extend that of 24 G. 2. c. 44. if the legislature had so intended, they would not have confined it to justices of the peace, a species of magistrates well known and understood in our law.

So much for the noble Lord.

ally.

As to the MESSENGERS—They do not fall within the words or meaning of the act of 7 J. 1. c. 5. which is confined to officers, who are persons known in our law and bound to execute the warrant of a justice of peace; an office of burthen, not of profit; and incapable to distinguish the precise limits of a jurisdiction.

This is in no respect the case of the king's messengers; in ordinary, who are persons unknown in our law, and mere volunteers in executing warrants of justices.

The words "other officers, &c." mean borougholders, &c.; officers of the same sort as constables and tythingmen; not king's messengers: these persons can not be considered as aiding and assisting the constables. The warrant and the fact are quite the reverse; the constables are directed to assist them. They do not act under the command of a justice of peace, or in his assistance.

This warrant is not under the hand and seal of a justice of peace. Therefore the act does not protect the defendants.

Nor

Nor is the act done in obedience to this warrant. The warrant was "to apprehend the author, printer, or publisher:" but they have executed it upon a person who was not the author, printer or publisher. Consequently, as they have not acted under it, they can't be protected by it.

It is said, "That a description is equivalent to naming the persons; and that here is a sufficient description."

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3dly.

But the description of an offence is no description of the person offending: and this is only a description of the offence.

The obedience to the warrant is the condition of the protection which the act gives to the officer. Therefore, the condition failing, the protection does not take place.

Here is no probable cause, nor any reason for justifying the officer under a probable cause. It is not like the cases of apprehending traitors or felons. Here is only information from one of their own body, "That the author of the paper had been seen going into Leach's house; and that Leach was the printer of the composition in general;" not of this particular paper.

But though neither this hear-say information was in itself true; nor would the consequence follow, if it had been true; yet they thereupon arrest and imprison an innocent man. Therefore these men themselves are to answer for doing this: not the person who issued the warrant. The warrant did not command nor authorize them to do what they have done. It is necessary for them to shew an acting in obedience to the warrant: otherwise they are not within the protection of the act. In proof of which, he cited two cases; one, by the name of * *Lawson v. Clark*; and the other a *Norwich*-case, where a bailiff had executed the warrant out of the proper jurisdiction. [IV. post. 1816.]

* Or Dawson
qu.

Upon these authorities, upon the reason of the thing, and upon the words of the act, the officer is not intitled to the protection of the act; nor needs the justice be made a party, but where the officer acts in obedience to the warrant: acting under colour of it only, is not sufficient.

Besides, the party apprehended was not carried before Lord Halifax, or dealt with according to law. Surely, this was the act of the officer; not of the person who signed the warrant.

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warrant. And *no reason* is given, stated, pretended, or ever existed, *why* this matter was so transacted. Therefore there was *no* probable cause or reason whereupon to ground a justification of this their conduct.

So that, even *allowing* the secretary of state to be a justice of peace, and the officers to be constables; yet the action lies against the plaintiffs in error, who have acted in this unjustifiable manner.

It appears therefore, that even *if* they had had a defence upon the *merits*, they *have not properly pleaded it*. However, in fact they had *no* defence upon the *merits*: the plaintiff *Leach* was neither author, printer, nor publisher of the paper; nor at all within the description of the warrant.

BUT the WARRANT itself is *illegal*. 'Tis against the author, printer and publisher of the paper, *generally*, without naming or describing them; and not founded on any charge upon oath; it is also, "To seize his papers;" that is, *all* his papers.

No justice of peace has power to issue *such* a warrant. Therefore Lord *Halifax* could not do it as a *justice of peace*. Nor is there any pretence of *usage* to support such a claim of doing it as *secretary of state*, further back than the *revolution*.

It lies upon *them*, to *prove* their claim, and to *show* their authority.

The PRACTICE of a particular magistrate can not controul the LAW. *Communis error* is not, in this case, sufficient to make law. It is the duty, and it is therefore, doubtless, the *inclination* of the court, to stop the mischief, as soon as it is complained of to them.

If "Author, printer and publisher," without naming any particular person, be sufficient in such a warrant as this is, it would be equally so, to issue a warrant generally, "To take up the robber or murderer of such a one." This is no description of the *person*; but only of the *offence*: it is making the *officer* to be judge of the matter, in the place of the person who *issues* the warrant. Such a power would be extremely mischievous, and might be productive of great oppression.

To ransack private studies in order to *search* for evidence, and even *without* a previous charge on oath, is contrary to *natural justice*, as well as to the liberty of the subject: and

it

it is as *useless* as it is cruel, in the case of *libels*; because it is the *publication* only that makes the *crime* of a libel.

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To search a man's private papers *ad libitum*, and even *without accusation*, is an infringement of the natural rights of mankind. And *this* is a warrant "To seize ALL a man's papers," without any particular relation even to the crime they would *suppose* him chargeable with.

No case of this sort has ever undergone *judicial* discussion and determination. And as the court does not interpose in cases not objected to, no arguments can be drawn from such as passed *sub silentio*, or were never *objected to*.

ALL the writers upon the crown-law say, "That there must be an *accusation*; that the person to be apprehended must be *named*; and that the officer is *not* to be left to arrest whom *he thinks fit*." For which, he vouched *Hall's Hist. P. C.* 1st part, page 580 and 586 and *Hawkins's P. C.* Book 2. c. 13. § 10. pages 81 and 82.

Here, it is left to the *officer*, to take up any person whom *he himself* suspects.

Lord Ch. J. Scroggs was *impeached* for issuing such warrants as this is.

Therefore he prayed judgment for the defendant in error.

Mr. Solicitor General *De Grey*, in reply, on behalf of the plaintiffs in error.

A SECRETARY OF STATE is an *officer by prescription*; and his office must be *as ancient* as the office of the person to whom he is secretary: for, he is and always has been an officer *necessary* to the crown; and the constitution always required the support of this office. And as his power to commit for *treason* depends upon *prescriptive right and the nature of his office*; so likewise it does, in *all* cases of preserving the *public peace*.

In the case of *Kendal* and *Roe*, the power, in *treason*, was acknowledged. In *Darby's* case, it was recognized, in *felony*. In *Earbury's* case, (where the warrant was general, as this is,) he was *continued* on his recognizance. A secretary of state has these powers, upon the foundation of *prescription*; not on our law books: and he has, equally, the power in him; whether he does or does not *exert* it in *law*

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and *common* instances. I suppose he is *as compellable* to act, as a *conservator* of the peace formerly was, *before* the acts of parliament which give power to *justices* of peace.

CHARTER-justices can scarce be called *commission*-justices and yet these statutes extend to them.

A "JUSTICE of the peace," means a *conservator*, a *warden* of the peace. Therefore there was no need to NAME *secretaries of state*, in the acts of parliament: they were included, *without* naming them particularly.

The marginal note in Lord Coke is no authority. However these officers are named in the text, "And certain "others his majesty's officers."

This action was brought for what was done in obedience to the warrant; which the officer was *obliged* to execute, in the best manner he could.

If there is any fault, it is in the *magistrate*: he should have described the offender with greater certainty. If the executing officer acts to the *best of his ability*; he is justified, and acts *in obedience* to his warrant.

Here, the officers *did so*: they were reasonably satisfied, "That *Leach* was the printer." And on search, this *probable* cause was *increased* to a higher degree: for, they found another fresh sheet of the *same* work, just printed off, and wet. They *detained* him *on occasion* of his being to be carried before Lord *Halifax* to be examined. The *officers* had nothing to do with his examination: *that* was the affair of Lord *Halifax*; and if he discharged the persons apprehended and brought before him, *without* examination, it was the better for them.

In *Vaughan* 111. *Stiles v. Sir Richard Cox* and others,—It was determined, that the defendants should have the benefit of the act; because they acted by colour of the warrant.

As to the WARRANT itself—It is objected, "That there is "no charge upon oath." But there was no occasion, he said, for it: and to that purpose, he cited the *Queen v. Darby* [v. *Portescue* 141.] *Rex v. Earbury*, Mich. 7 G. 2. and 1 Hale H. P. C. 582. where it is laid down, that "Tis convenient, "though *not always necessary* to take an information upon "oath of the person that desires the warrant."

It is objected "That this warrant is *not* authorized by any length of usage."

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But the usage, as here stated, is *sufficient*: and it must be taken to be coeval with the office. The bill of exceptions indeed only takes it up from the *revolution*; asserting that it has been so ever since *that* time: but the *facts* go up to the restoration; and none of a *different* form were produced, prior to the revolution.

As to *seizing papers*—It is difficult indeed to draw the exact line. But it is certainly necessary, in *some* degree: and no instance is produced, of such warrants having ever been *abused* as instruments of oppression.

He concluded, upon the whole, that the plaintiff had no right to bring his action.

LORD MANSFIELD—I suppose, this is intended to be argued again. However, I will say something, at present, upon it.

A bill of exceptions supposes the evidence *true*; and questions the *competency* or *propriety* of it.

"Whether there was a *probable cause* or ground of suspicion, was a matter for the *jury* to determine: *that* is not *now* before the court. So—"Whether the defendants detained the plaintiff an *unreasonable time*."

But if it had been found to have been a reasonable time; yet it would be no justification to the defendants; because it is stated "That *this* man was neither author, printer or publisher:" and if he was *not*, then they have taken up a man who was *not* the subject of the warrant.

The three material questions are—1st. "Whether a *secretary of state* acting as a conservator of the peace by the *common law*, is to be construed *within the statutes* of James the first, and of the late king." 1st question.

The protection of the officers, if they have acted in obedience to the warrant, is *consequential*, in case a secretary of state is within these statutes.

As to the arrest being made *in obedience* to the warrant, or only under *colour* of it and without authority from it—This 2d question.

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question depends upon the *construction* of the warrant; whether it must not be construed to mean "*Such persons as are under a violent suspicion of being guilty of the charge*" (for they cannot be *conclusively* considered as guilty, till *after trial and conviction*.) The warrant itself imports only *suspicion*; for, it says,—"*To be brought before me, and examined, and dealt with according to law*"; and this suspicion must eventually depend upon *future trial*. Therefore the warrant does not seem to me, to mean *conclusive* guilt: but only *violent suspicion*. If the person apprehended should be tried and *acquitted*, it would shew "*That he was not guilty: yet there might be sufficient cause of suspicion.*"

Mr. *Dunning* says, very rightly, that "*To bring a person within 24 G. 2. the act must be done in obedience to the warrant.*"

3d question.

The last point is, "*Whether this general warrant be good.*"—

One part of it may be laid out of the case: for, as to what relates to the *seizing his papers*, that part of it was never *executed*; and therefore it is out of the case.

It is not material to determine, "*Whether the warrant be good or bad*"; except in the event of the case being *within 7 J. 1. but not within 24 G. 2.*

At present,—As to the validity of the warrant, upon the single objection of the *incertainty of the person*, being *neither named nor described*—The *common law*, in many cases, gives authority to arrest *without warrant*; more especially, where taken in the very act: and there are many cases where particular *acts of parliament* have given authority to apprehend, under general warrants; as in the case of writs of assistance, or warrants to take up loose, idle and disorderly people. But here, it is not contended, that the *common law* gave the officer authority to apprehend; nor that there is any *act of parliament* which warrants *this case*.

Therefore it must stand upon *principles of common law*.

It is not fit, that the receiving or judging of the information should be left to the discretion of the *officer*. The *magistrate* ought to judge; and should give *certain directions* to the officer. This is so, upon reason and convenience.

Then

Then as to *authorities*—*Hale* and all others hold such an uncertain warrant *void*: and there is *no* case or book to the contrary.

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It is said, "That the *usage* has been so; and that many such *have been* issued, since the revolution, down to this time."

But a *usage*, to grow into law, ought to be a *general usage*, *communiter usitata et approbata*; and which, after a long continuance, it would be mischievous to overturn.

This is only the usage of a *particular office*, and *contrary* to the usage of all *other* justices and conservators of the peace.

There is the *less* reason for regarding this usage; because the form of the warrant probably took its rise from a positive statute; and the former precedents were inadvertently followed, after that law was expired.

Mr. Justice WILMOT declared, that he had no doubt, nor ever had, upon these warrants: he thought them *illegal* and *void*.

Neither had the two other judges, Mr. Justice YATES, and Mr. Justice ASTON, any doubt (upon this first argument) of the *illegality* of them: for, *no degree of antiquity* can give sanction to a usage *bad in itself*. And they esteemed this usage to be so. They were clear and unanimous in opinion "That this warrant was *illegal* and *bad*."

LORD MANSFIELD—Let it stand over, for further argument.

The case standing in the paper, on *Friday* 8th Nov. 1765, for farther argument—

Mr. *Yorke* Attorney General, was now to have argued on behalf of the plaintiffs in error; and begun to enter into his argument: but when he came to mention the two cases cited by Mr. *Dunning*, both of which were determined before Lord *Mansfield*, upon 24 G. 2. c. 44. one of them at *Norwich*, summer-assizes, 1761; (where damages were given;); the other * of them, on a warrant under the vagrant act of 17 G. 2. (where his lordship held, "That the defendant "ought to shew that the officer had acted in *obedience* to the "warrant;"

Dawson or
Lawson v.
Clarke. V. ante,
p. 1761.

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"warrant;" and he did so;) he seemed to intimate that this objection "of their not having done so, in the present case," was too great a difficulty for him to encounter; and therefore rested the matter where it was, without proceeding any further in his argument.

Lord MANSFIELD remembered both these cases; and said, he still continued of the same opinion.

Where the justice can not be liable, the officer is not within the protection of the act. The case in *Middlesex* concludes exactly to the present case. For, here the warrant is to take up the *author, printer, or publisher*: but they took up a person who was *neither author, printer, nor publisher*: so, that case was a warrant "to take up a disorderly woman;" and the defendant took up a woman who was not so.

And he held the same opinion now, he said, as he did before, in the case at *Norwich*.

This makes an end of the present case: for, this is a *previous* question; and the *foundation* of the defence fails.

The consequence is, that the judgment must be affirmed.

The other judges assenting,

The RULE of the COURT was

"That the judgment be affirmed."

JUDGMENT AFFIRMED."

Bulbrook versus Sir Robert Goodere and Others.

Water bailiff of the river Thames has no right to take the nets of a person fishing in his own fishery.

THIS was a demurrer to an action of trespass for breaking and entering the plaintiff's close called the river *Thames*; and taking up breaking and destroying his bucks there erected and placed for the catching of fish; and taking his fish out of the bucks, and carrying them away, and converting them to their own use.

The defendants in their plea, alledge, that the close in question is part of the river *Thames*, and lies between *Staines* bridge and the head of the river; and that the conservancy of that part of the river is in the crown. Then they alledge, that the officer of water-bailiff is in the gift of the crown. Then they set forth the statute of 1 *Eliz.*, c. 17. which prohibits the taking of fish but only with the particular nets

or tramels therein specified, under forfeiture of a pecuniary sum, and of the fish so taken, and also of the unlawful engines. Then they shew a grant from the crown to two of them, of the office of water-bailiff between *Staines* bridge and the head of the river. They alledge that these bucks were engines for catching of fish, *other* than the nets and tramels allowed by the said act of parliament; and were *unlawful* engines; and were wrongfully and unjustly erected there; and therefore they justify the taking up the bucks and throwing the fish into the river; two of them, as water-bailiff; and the other two, as their servants and by their command.

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Others.

The plaintiff in his replication admits the conservacy to be in the crown; and that the office of water-bailiff is in the gift of the crown; and admits the act of 1 *Bliz. c. 17.* as stated in the plea; and admits the grant to Sir Robert Goodere and others: but protesting that the bucks which were taken away by the defendants, were not unlawful engines; for replication, he says, and insists, that all offences done and committed by unlawful fishings in the said river *Thames*, by the laws and statutes of this realm ought to have been and ought to be in due and legal manner presented, or information concerning such offences ought in due and legal manner to be made at a court of conservacy, or other court having sufficient and competent authority in that behalf; and there ought to have been and ought to be discussed tried and determined, according to the laws and statutes of this realm. Then he avers, that no information, presentation, conviction, or adjudication whatsoever had ever been made before the committing this trespass, at any court of conservacy, or other court concerning the said offence in the plea mentioned. He concludes therefore, that the defendants committed the trespass in their own wrong; and prays judgment against them.

The defendants demur generally. To which there is a joinder in demurrer.

Mr. Walker argued for the defendants.

There is no one *fact* suggested, but a matter of *law*; nothing that we could take *issue* upon.

The only *fact* alledged in our justification, and not admitted by the replication, is denied by *protestation* only.

If we had rejoined, we could only deny *facts* suggested: we could not meddle with matter of law. Here they only suggest matter of law; viz. "That it ought to have been presented." We could not, by a rejoinder take *issue* upon that matter of law.

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BULBROOK v.
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Others,

Lord MANSFIELD—The point lies in a nut-shell: the only question is “Whether they could seize the nets *before* “conviction.”

Mr. Walker—We do not claim the *forfeitures*: we only set up this that we have pleaded, as a defence or *excuse* for the *trespass*.

We have a right, as water-bailiff, to stop and prevent an illegal *nusance* contrary to the act of parliament; and to *remove and abate* this private *nusance*: (though we have a right also to proceed subsequently for the penalty; which we have not yet done.)

And he cited several cases, to prove that the party injured may remove a *nusance*. *F. N. B.* 184, 185. *1 Ro. Abr.* 664. *Title Distress*, Sir William Jones 221. *James v. Hayward*. *Cro. Car.* 228. *Reynell v. Chambernoon*. *5 Co. 2.* part 101. *Penruddock's Case*. *9 Co. 57.* *William Aldred's Case*. *2 Salk.* 458. *Rex & Regina v. Wilcox*. And *3 Bulst.* 197. *Morrice v. Baker, et ux.*

Where the injury is *increasing*, the party injured may *stop* it; whether the *nusance* be *public* or *private*: and in *private* *nusances*, he may have an action also for the injury already sustained. And this reasoning is applicable to the present case.

N. B. The *replication* was admitted to be *bad*. But see the 6th. 7th. 8th. 9th. 10th. and 11th sections of this act: where power is given “To inquire concerning offences against “it, by the oaths of 12 men;” and presentments and convictions are mentioned expressly.

Mr. ASHHURST was to have argued for the plaintiff: but, it was not thought necessary.

Lord MANSFIELD—An offence is here *created* by an act of parliament. If you take advantage of this act, you must pursue the method prescribed by it. This is the plaintiff's *own fishery*: and he might have done what he would in it, before this prohibition by the act of parliament.

Mr. Justice WLMOT concurred. This is not to be considered as a *nusance*, either public or private. The violation of this public law is not within the idea of a *nusance*.

Mr.

Mr. Justice YATES concurred. This was the plaintiff's *own* fishery: and the defendants have taken up the bucks, and taken the fish. This laying the bucks was *no nuisance*: and no power is given by the act, "To seize." The defendants are not to be their own judges. They ought to have followed the method prescribed by the act. The water-bailiff has no right to take the nets of a person fishing in his *own* fishery.

1765.

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Others.

Mr. Justice ASTON declared his assent, to the same effect.

Whereupon, *Per Cur.*

JUDGMENT for the PLAINTIFF.

Fabrilus versus Cock.

THIS was an action of trover for 6000 pagodas, of the value of eight shillings each, or 2400 *l.* sterling; in which a verdict had been given for the plaintiff, for 2400 *l.* *at nisi prius* in *Middlesex*, before Lord Mansfield.

Saturday, 9
Nov. 1765.

New trial granted subornation of witnesses having been discovered since the former.

On Friday 25th of January last, Mr. Serjeant Davy, on behalf of the defendant, moved for a *new trial*.

The plaintiff was a *Dane*: and the case he made at the trial, was "That he had escaped from a *Danish* settlement in the "East Indies, with 6000 pagodas *quilted* about his body." (He was present in court; walked to and fro, with great agility; and then shewed he had 6000 pieces of lead, of the size of pagodas, concealed and fastened about his body.) That he came aboard one of our *East India* ships; of which, the defendant was mate: and that he had deposited these pagodas with him.

Some *Danish* sailors, who were aboard, swore to circumstances which proved his having the pagodas and putting them into the defendant's hands. Great stress was laid upon the confusion the defendant appeared to be in, when the money was demanded of him. A witness, who called himself a *Danish* consul, swore to circumstances in support of the plaintiff's case.

The defendant always denied the whole story; but was not able to contradict the proof at the trial. So the jury, to the satisfaction of Lord Mansfield, found a verdict for the plaintiff for 2400 *l.* the value of the pagodas.

The

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FABRISTON.
Cock.

The defendant moved for a new trial, upon the ground, "That the whole was a FICTION, supported by perjury, which he could not be prepared to answer. That since the trial, many circumstances had been discovered, to detect the iniquity, and to shew the subornation of the witnesses."

THE COURT, after a very strict scrutiny, on Monday the 11th of February last, granted a new trial, on payment of costs.

The justice and propriety of this determination, appeared in a very strong light to many persons; who thought the whole story to be manifestly a scheme of villainy, supported by perjury. And the plaintiff never dared to try it again. And now (this 9th of November 1765) on Mr. Davenport's motion, the plaintiff not having proceeded, a rule was made for

JUDGMENT as in case of a NONSUIT.

Saturday, 16
Nov. 1765.Leith *versus* Mac Ferlan.

IT was agreed by court and counsel, that a writ of error could not be *non-pros'd*, without a RULE "To assign errors."

Johnson *versus* Jebb.

Plaintiff may
bring error to
reverse his own
judgment.

WHERE a plaintiff brings a writ of error to reverse his own judgment, (which is nothing strange or unreasonable where it is given for a less sum than he has a right to demand,) the common method of bringing a *scire facias quare executionem non*, or a *scire facias ad audiendum errores*, would be improper. Therefore, if the plaintiff in error will not proceed, this court may and ought to make a rule to oblige him to assign errors within a limited time.

Accordingly.—

THE COURT made a rule upon the plaintiff in error, to assign error within four days; or else that his writ of error should be *non-pros'd*.

N. B. This case arose upon the late practice of the court of common pleas about paying money into court; which used to differ from the practice of this court, (who order so much as is paid in by the defendant to be struck out of the declaration; whereas, in C. B. they did not use to strike it out, but the plaintiff took judgment at all events:) which late practice, Sir Fletcher Norton said, that court had, very recently altered, from the inconvenience they had perceived in it, (particularly in the present cause,) and had made their practice conformable to the practice of this court.

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It was an action in C. B. brought upon a policy of insurance: and the defendant had paid in a sum of money into that court.

Bond and his Wife, *versus* Seawell and his Wife.

(1 Black. Rep.
407. 422, 454.
S. C.)

THIS was a case reserved at *nisi prius* at Guildhall, before Lord Mansfield: and the question was upon the due execution of the will of Sir Thomas Chitty.

Saturday, 16
Nov. 1765.

This will, or paper purporting to be a will, bore date on 20th March 1762: and the cause was tried at the sittings after Hilary Term 1765.

Whether the
attestation of
a will of lands
be valid, when
the witnesses
only saw the
last sheet of the
will.

It was proved, " That Sir Thomas Chitty made his will,
" consisting of two sheets of paper, all of his own hand-
" writing; and signed his name at the bottom of each page:
" and he also made a codicil, of his own hand-writing; upon
" one single sheet. He called in one Francis Harding; shew-
" ed him both the sheets of his will, and his signature to every
" page thereof; and told him THAT was his will. He also
" shewed him the codicil; and desired him to attest both the
" will and codicil: which he did, in the presence of the tes-
" tator and in the manner appearing upon the face of the
" instruments; and then went out of the room. John
" Vaughan and John Leyland came in, immediately after-
" wards. The testator shewed them the codicil and the LAST
" sheet of the will; and sealed both, before them: he took
" each of them up, and delivered them severally as his act
" and deed, for the purposes therein mentioned. These
" witnesses attested the same, in the testator's presence; but
" NEVER SAW the FIRST sheet of the will; nor was THAT sheet
" PRODUCED to them; nor was the same, or any other paper,
" UPON THE TABLE. Both the sheets of the will were found

" with

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"with the codicil, in the testator's bureau, after his death, all wrapped up in one piece of paper: but the two sheets of the will were not pinned together."

On the trial, it was agreed that a verdict should be given for the plaintiff, subject to the opinion of the court; and in case the court should be of opinion "That the said will was duly executed according to the statute for the prevention of frauds and perjuries," then the verdict should stand: but in case the court should be of opinion "That the said will was not duly executed according to the said statute for the prevention of frauds and perjuries," then a verdict should be entered for the defendants.

There were three arguments upon this case: the first, on Friday 6th May 1763, by Mr. Morton for the plaintiffs, and Mr. Yates for the defendants; the second, on Friday 10 June 1763, by Serjeant Hewitt for the plaintiffs, and Mr. Thurlow for the defendants; the third, on Tuesday 31st January 1764, by Mr. Willes for the plaintiffs, and Mr. Norton (Attorney General) for the defendants: and it stood for the opinion of the court.

But there being some difference upon the case as stated, it was thought proper to have it argued before all the judges in the exchequer-chamber: which argument I did not hear, and therefore cannot report.

LORD MANSFIELD now (on this 16th November 1765) acquainted the bar, that there had been a conference on the preceding evening, amongst all the judges except Mr. Baron Adams (who was out of town,) upon this case; which was an amicable suit, he said, to try the real merits of the question: and it was agreed by the parties, "That if either side desired it, the case should be turned into the form of a special verdict."

It occurred to the judges, that the way in which the parties have put the case, does not go to the whole merits; because, if the first sheet was in the room at the time when the latter sheet was executed and attested, there would remain no doubt of its being a good will and a good attestation of the whole will: but if the first sheet was not then in the room, a doubt might arise "Whether it was or was not a good attestation, as to the real estate."

However, no opinion was given or formed by the judges, upon such doubt which might so arise, if it should appear "That in fact the first sheet was not then in the room."

His

His lordship observed, that the first sheet stopped or ended in the *middle* of a sentence. In the *last* sheet, the *devise of the land* was contained: and charges upon his lands were also contained in it.

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A will properly attested may, (he said) by *reference* to another instrument, establish particular clauses so ascertained by a clear reference, as strongly as if the clauses so referred to had been repeated in the will *verbatim*: (for which he cited the case of *Acherley and Vernon*.*) And here are references, in this will, from one part to another: in the first sheet, the testator gives the trust of lands which were to be *after-mentioned*. In the last sheet, he appoints persons *trustees* of his will, who are *not* his executors, and therefore must be devisees of his land: he also calls them " Trustees of his will, upon the several trusts therein mentioned."

* M. 10 G. 1.
Vide Comyn's
Rep. 381.

But the question made at the trial, and submitted by the case, as it now stands, turns only upon the SOLEMNITY of the EXECUTION; not at all upon the *intent* of the testator. And we are of opinion, " That the *due execution* of this will can not be come at, in the method wherein the matter is now put."

If this be considered as a special verdict, we think it is defectively found, as to the point of the *legal execution* of the will.

Every *presumption* ought to be made by a jury, *in favour* of such a will, when there is no doubt of the testator's intention.

It is not necessary, that the witnesses should attest in the presence of each other; or, that the testator should declare the instrument he executed " to be his will;" or, that the witnesses should attest every page, folio, or sheet; or, that they should know the contents; or, that each folio, page or sheet should be particularly shewn to them.

This has been settled.

But the fact " Whether the *first sheet* of his will was or " was not *in the room*, at the time of executing and attesting " the latter," may be *material* to be known. If it was, the jury ought to find for the will, generally; and they ought to find all things *favourable* to the will. If it be *doubtful* " Whether the first sheet was then in the room, or not"; we all think the circumstances sufficient to *presume* " That it was " in the room"; and that the jury ought to be so directed.

But,

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But, upon a *special* verdict, nothing can be *presumed*.

Therefore we are all of opinion, that it ought to be tried "over again." And if the jury shall be of opinion, that it "was then in the room," they ought to find for the will, generally: and they ought to *presume*, from the circumstances proved, "That the will *was* in the room."

A NEW TRIAL WAS ORDERED.

(1 Black. Rep.
570. S. C.)
Tuesday, 19
Nov. 1765.

Lavie and Another, Assignees of Jane Cox, a Bankrupt, *versus* Phillips and Others, Assignees of John Cox, a Bankrupt.

Feme covert
sole trader in
London liable
to commission
of bankruptcy.

THIS was a case reserved upon a trial at *nisi prius*, before Lord Mansfield at Guildhall, at the sittings after Trinity term 1765, in an action of trover, brought by the assignees of Jane Cox, a sole trader in London, and a bankrupt; against the assignees of John Cox, her husband, who was also a bankrupt.

The action was brought in order to try whether the plaintiffs had a right, as assignees of Jane, to certain goods in the millinery trade carried on by her after her marriage; which goods had been seized by the persons acting under the commission issued against John Cox, her husband.

It was tried by a special jury: and a verdict was given for the plaintiffs; subject to the opinion of this court, upon the following facts and custom, then and there stated and agreed: *viz.*

1st. The commission of bankruptcy issued against John Cox the husband, on the 13th of March 1764: and the commission against Jane his wife, on the 26th of April 1764.

2d. The CUSTOM OF LONDON, taken and translated from *Liber albus* in the town-clerk's office, is as follows—"Where
" a *feme, covert* of a husband, useth any craft in the said city
" on her *sole account*; whereof the husband meddleth no
" thing; *such a woman* shall be charged as a *feme sole*, concerning every thing that toucheth the craft: and if the husband and wife shall be impleaded, in such case the wife
" shall plead as a *feme sole*; and if she is condemned, she
" shall

"shall be committed to prison till she has made satisfaction;
"and the husband and his goods shall not, in such case, be
"charged nor impeached."

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3d. This *Jane Cox*, the wife, was a *sole trader*; and car-
ried on a *separate trade* within the said city, according to the
custom of the said city of *London*.

4th. The *fans*, for which this action was brought, were
part of the effects of her *sole trade*.

5th. The assignees of the husband's commission seized those
fans, the day the commission issued against him.

The question was put as a single one; but was in effect
double: namely,

1st. Whether the assignees of *John*, the husband, had a
right to take the separate effects of *Jane* his wife, who was a
sole trader; and apply them towards satisfaction of the debts
of the husband, under the commission awarded against him, in
prejudice of the separate creditors of his wife.

2d. Whether a commission of bankruptcy may issue against a
married woman, being a *sole trader*.

Mr. *Eyre* (recorder of *London*) for the plaintiffs, insisted
1st. That the husband's assignees had no such right: and
2dly. That a commission may issue against a feme covert,
being a *sole trader*, in *London*.

First. The assignees of the husband could not seize the
separate effects of the wife: for, they were no part of the
husband's property.

The custom is, "That the wife is to carry on the trade
"upon her *sole account*; in which trade the husband is not to
"intermeddle." The words of this custom were read in 3 C.
1 *Langham v. The wife of John Bewett*, Cro. Car. 68. *Little-*
ton's Rep. 31. and *Hetley*, 9. S. C. And it appeared, that
by the custom, she is to have all advantages, and to be sued,
as a feme sole. Also it is part of the custom, "That if the
"husband and wife shall be impleaded, the wife shall plead
"as a feme sole; and if she pleads false, she shall be com-
"mitted to prison till she has made satisfaction; and the hus-
"band shall not be charged nor impeached."

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nees.

The husband is joined in an action brought against her, only for conformity: but execution shall be only against the wife; though the judgment be against him. She must be supposed to have wherewithal to make satisfaction: otherwise, it would be absurd and unreasonable to commit her "till she makes satisfaction." Therefore she has clearly a capacity to have property of her own.

I have looked through all the books; but find very few authorities on this head. In the note at the end of *Langham's* case as reported in *Cro. Car.* 68. a case betwixt *Gepings* and *Harding*, in the Year Book of *M. 29 H. 6. rot.* 344. is mentioned and referred to: but the case is not to be found in the Year Books. It is said to have been trespass for goods sold by the delivery of the feme. Issue was taken "Whether she was a feme sole:" and it was found "That she was not a feme sole merchant." So it is there stated.

LORD MANSFIELD—The *custom itself* is not disputed: only, the *consequence* or *extent* of it.

Mr. Recorder—In the Year Book of *21 H. 7. fo.* 18. *pl.* 29. where the tenant had pleaded a feoffment; and the plaintiff had replied "That the feoffor was under age, and "when he came of age, had entered upon the defendant "and enfeoffed the plaintiff," to which the defendant had rejoined "That there was a custom in the vill for an infant "of the age of 15, to make a feoffment—which was objected "to, as a *departure*"—*Palmer* (then a * judge) in order to prove it to be a departure, puts a case of a rejoinder of a custom in *London*.—"As in *this* case—In a writ of trespass, I "say that a woman was seised of the same goods, as of her "proper goods, and gave them to me: wherefore I took "them. And I give colour to the plaintiff. And the plaintiff says, that at the time of the gift, she was his wife &c. "To which, I say there is a custom in *London*, that women "are sole merchants: wherefore &c. This is a clear departure. So here. Wherefore &c."

* He was only a
serjeant.

The *wife* has a *complete property* in the effects of her sole trade.

As to any objection arising from the commission against the husband, as being tantamount to the *husband's intermeddling*—It was not with his or her consent; and, at the utmost, can extend only to her *future dealing*. But the case of *Cecil*
and

and *Juxon v. Juxon*, in vol. 1. p. 278. of Mr. Baron Atkyns's Reports, proves that he could not intermeddle.

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LORD MANSFIELD—That was only securing the woman's property. And a woman's separate property has been secured by a court of equity, in several cases: but that does not, nor did there depend upon any particular custom.

Mr. Eyre—Wherever she continues liable to her own separate debts, her property in her effects must necessarily remain in her, for the purposes of the trade: otherwise, she would be liable to perpetual imprisonment.

This invasion upon her property could not have been made in the case of the wife herself, if she had not become a bankrupt: but it is much more unreasonable, now it is the case of her separate creditors.

The second point is "Whether a feme sole trader in London CAN become a bankrupt."

Now this is a consequence of her sole trading: it follows of course. He mentioned an instance in *Lord Hardwicke's time; but said that the books which would have verified it were lost, and therefore could not be searched.* [See it particularized by Lord Mansfield, post. pa. 1828.]

* Mr. Seare (a
bencher of the
Middle Temple)
informs me,
"That this
"was a com-
"mission

"against Mary Dennis (wife of Peter Dennis,) a linen-draper and sole trader in London. It was dated 12th March 1741: and on the 16th the commissioners (Mr. Atkyns, Mr. Seare, and Mr. Osbaldiston) declared her a bankrupt." See Mr. Baron Atkyns's Reports, vol. 1. pa. 206. case 110. *ex parte Carrington*; on a petition to supersede a commission against Dorothy Jones, because she was a married woman: the Lord Chancellor dismissed the petition; declaring "That as she was admitted to be the daughter of a freeman of London; and appeared plainly to be a separate trader, by the custom of London: she was clearly liable to bankruptcy, notwithstanding her coverture." See also Comyns's Digest, vol. 1. pa. 521, and Blackstone's Commentaries, vol. 1. pa. 477. Both of them in point "That a feme covert merchant may be a bankrupt;" or (as Mr. Justice Blackstone more fully expresses it) that "a feme covert in London, being a sole trader according to the custom, is liable to a commission of bankruptcy." [N. B. Mr. J. Blackstone seems to found his assertion upon this very case: at least, he cites only this case in proof of it.]

If she might become a bankrupt, then her assignees had a right to demand these goods in an action of trover, in the manner they have now done.

Mr. Dunning, on behalf of the defendants, did not dispute the custom: but (admitting it) argued to this effect.

The present question turns upon the import and extent of it.

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nees.

It cannot be taken upon so large a ground as has been insisted on. The custom does not, *in terms*, express any such thing. I take the custom from *Liber albus*. There is nothing in it that *takes away* from the husband any of his *marital* rights: nor does it *give* the wife any *exclusive* rights. It only exempts him and his effects from being liable to her debts.

The husband may put an *end* to his wife's sole trade, whenever he *pleases*; and at the *end* of it, the profits of it will be *his property*. His power over her effects, and his property in them, always remain in him; though subject to a right of action in her creditors.

It does not follow from this custom, or from any branch of it, that the effects of the wife are protected from being liable to the demands of her own husband or his creditors. He has the same property in them, as a husband has in all other cases: and he may dispose of her effects, in his life-time, or by his will. If so, they are become legally vested in his assignees under the commission of bankruptcy issued against him: and, consequently, they were lawfully seized by his assignees.

Local customs are *stricti juris*: they are derogatory from the common law; and shall not be extended. 1 *Rep. Abr.* 567. letter G. 2 *Leon.* 109. Sir John Savage's case.

THIS custom is totally *silent*, as to the interest and property of the husband in the wife's goods. Therefore it shall be left to the *common law*.

The *suing* and *being sued* as a *feme sole*, is a privilege confined to *residence* in the city, and to the *city-courts*. Here, she must sue, and be sued, *with* her husband. *Tr.* 25 *Eliz.* Moore, 135. Stanton's case. 1 *Leon.* 131. Chamberlain and Thorp's case. 1 *Modern* 26. *Anonymous.* *Cro. Car.* 69. Langham v. Bewett. *Comberb.* 42. Soan v. Mace.

As to the right of the husband over the effects of his wife—If costs be adjudged upon her suing in the spiritual court *pro reformatione morum*—, the husband shall have the *costs* recovered by her: or he may release them.

As to the case cited in *Cro. Car.* 69. from the Year-Books—Delivery by an infant is an excuse, in trespass.

EVERT

EVERY *scintilla* of interest in the bankrupt passes to his assignees, and here the property was vested in the husband's assignees, before the wife's assignees had any right.

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As to the second question—Such a woman, married and using a sole trade, is *not* within the *spirit* of the bankrupt-laws; though within the *letter*. This is only the *second* instance of such a commission issuing. There was such a one in the year 1741: but that was not litigated; it passed *sub silentio*.

Upon the statutes of queen *Elizabeth* and king *James*, the words of them do indeed take in this case: but the provisions of them relate only to persons *sua juris*.

SOME of them are *penal*, and even *capital*: which must relate to *free* agents. But a married woman is *not* so: she is under the coercion of her husband. He may prevent her from surrendering.

OTHERS of these provisions relate to *lands*, and *chattels* *real*, and *choses in action*: and these were never meant to be taken from a married woman. She may have dower, or jointure: and how is she to convey her right? it was not meant to make her goods liable to such a severe execution as these acts render the objects of them liable to. She has *not* such a sole property in them, as to exclude the rights of her husband.

HER creditors may take their remedy under the commission issued against her husband.

Mr. *Byre*, in reply.

As to the second point—A *feme covert*, sole trader, is within the *spirit* of the bankrupt-acts, as well as within the *letter*.

As to the first point—The positions which I have laid down are consequences without which the custom itself can not exist.

The husband had no right to seize his wife's effects; she being a sole trader, in *London*: and the husband's assignees are assignees of *his property only*; *not* of his *marital rights*, whatever they may be; and of which, such a power of seizure was certainly no part.

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LORD MANSFIELD said, he had an opinion at the trial; and having thought of it since, he now *continued* in it: and he added—"I am very well *satisfied* in my opinion."

As to the single instance of a commission having ever before actually issued against a feme covert sole trader—It is perhaps only the *first that has been found*: it does not follow, that there certainly *was* none before it. There probably were others; though not now recollected, or particularly ascertained.

His lordship having particularly stated the case, observed, in repeating that part of it which agrees "*Jane* to be a *sole* trader, and to have carried on a *separate* trade within the city according to the custom of it"; that it must, consequently, be a trade wherein her husband did *not* intermeddle.

He then shortly rehearsed the arguments of the counsel; and took notice that Mr. *Dunning* had put the question upon this point—"Whether the husband is *totally* excluded from *all* power over the effects of the wife."

Whereas the present question is *not* between the husband and wife; but between *his* and *her* creditors: *she* is *no* party to this case. Therefore 'tis not necessary to go into that question.

But, taking it for granted, "That the husband might put a stop to the wife's separate trade *in futuro*; and *after* that, might have a right to the residue;" (I say, *in futuro*; for he certainly could *not* do it with a *retrospect*;) yet it does not follow, that he can take to himself what belongs to her creditors. This would *destroy* the custom, by rendering it nugatory and ineffectual. And if he himself could not prejudice her creditors, his assignees can not do it.

The feme sole trader in *London* under this custom must indeed, bring her action in *London*: but such custom would be allowed in any other court, in a defence by the husband.

Perhaps there might be difficulty in the wife's having a remedy, *herself*, against her husband: but there is none, as to the creditors of the wife. They are intitled to a remedy for the seizure of her effects, out of which they were to be paid their just debts.

The separate effects of the wife are, in the *first* place, liable to her separate creditors: but if they were liable, in the first

first place, to the *husband's* debts, this would destroy the end of the custom.

In joint-commissions of bankruptcy, *joint* debts are first paid; then, the *separate* debts: so also, where there are different joint-commissions.

As to the second point—"Whether she be liable to a commission"—

The statutes of bankruptcy extend to the city of *London*: and the words of the statutes take in this case. And it is for the benefit of the *wife*, "That she should be liable to a commission"; because, otherwise, she would be liable to *perpetual imprisonment*. It is also for the benefit of the *creditors*; (who can not, by reason of this custom, come at the husband.) There is no reason to take this case *out* of the acts relating to bankruptcy. The husband himself was not liable to the wife's creditors; nor had he any demand upon them. The consequences of her bankruptcy, as a sole trader, concern only the relation in which she stands to *her creditors*; and they, to *her*.

As to the precedents—There is no method of *searching* for commissions that may have issued against sole traders: but here is one instance produced, of such a commission; which is very express. It issued in Lord *Hardwicke's* time; and was directed to Mr. *Atkyns*, Mr. *Crafter*, and Mr. *Seare*, three experienced gentlemen; and Lord *Hardwicke* allowed a * certificate.

* It was signed by the commissioners, on the 17th of July 1742.

As to Mr. *Dunning's* supposed inconveniences—This custom affects no rights but such as are the subject of the custom; not marital or any other rights.

And as to the danger to the wife, from the coercion of her husband—She could never be liable to the guilt of a capital offence, where she was under an invincible necessity.

I am of opinion, that a commission may be taken out against her as a sole trader, with respect to her separate effects in trade.

Mr. Justice WILMOT—This is a *consequence* of the custom. The custom establishes her being a sole and separate trader: it follows of course, that these goods, in her separate trade, may be taken and seized under a commission of bankruptcy against her.

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The present question is not now between the husband and wife ; but between two sets of *creditors*, those of the one, and those of the other. She has, by this custom, particular privileges ; and her creditors have particular rights, as against her. These customs (though local) are to be considered as allowable under the general law of the land, when they come in question in *other* courts ; though the *action* must be brought in the *local* court.

As to the husband's intermeddling—He certainly can not do it, so as to injure her *creditors* : it would be a strange thing indeed, if the husband could intermeddle so as to affect the *creditors* of the wife, to their prejudice. And if he *himself* can not do so, no more can his *assignees*, who stand in his place.

The second point is of consequence. It must be *confined* to her *debts in the way of her trade*. And as to that, she is within the words and meaning of the bankruptcy-acts ; and her assignees stand just in her place.

The husband's assignees can not take her effects ; nor her assignees, his. But, the commission against *her*, ought to be confined to matters in the *way of her trade*.

Mr. Justice YATES was of the same opinion.

An action upon the custom can only be brought in the mayor's court of *London* ; but the custom may be *pleaded in bar*, in a superior court. *Bro. Customs* 43. It may be used in a superior court by way of *defence* : and in such cases, the superior court will *take notice* of the custom.

The only question here is, " Whether the effects of the " wife belonged to *HER assignees* under the commission which " issued against her."

The property in these goods was transferred to them : and they certainly had a right to recover them.

In *1 Shower* 183. *Fabian v. Plant*—Sir Bartholomew Shower said, " That the husband shall not put in bail." The wife alone is chargeable ; and the *husband's effects* are not : therefore he can not take her's from her *creditors*.

A commission being issuable against her is a *consequence* of the custom for her sole trading.

As

As between the husband and wife, he has a right to seize her effects: SHE has no remedy against him, from the custom. But he can not meddle with them, so as to affect her creditors.

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There can be no objection from the bankrupt-laws. She is within them: but she could not be liable to capital punishment, if she was really under her husband's coercion.

I have not the least doubt about this case.

Mr. Justice ASTON said, he remembered a case in C. B. in his time, in the manor of *Harwell*; where this custom of feme covert sole trader was established.

Her person and her effects in trade are answerable to her creditors: and the husband is bound, by an implied consent.

The statutes of bankruptcy are but as a *statute-execution* upon her effects in trade, so far as they are liable by law.

The assignees of the husband only stand in his place: and he himself could not have receded from his consent. He may put an end to her sole trade, in futuro: but he can not do it, with a retrospect. He can not take away the prior right of her creditors to her effects as a sole trader. This custom does not interfere with any marital rights: it respects only trade and commerce.

Per Cur. unanimously,

JUDGMENT for the PLAINTIFFS.

Mr. Justice WILMOT observed, that this custom subjected the wife to an execution: to which she was not liable at common law.

Rex versus Roger Aikin.

Wednesday,
20 Nov. 1765.

THE defendant had been convicted on the hawkers and pedlars act: and the conviction was removed hither, by certiorari.

Conviction on hawkers and pedlars act, not to be set aside for inaccuracy.

Sir Fletcher Norton objected to the conviction: for

1st. He was not summoned, to answer to the charge: at least, it does not appear, that he was summoned.

N n 4

2dly. The

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Aikin.† And V. ante,
pa. 1164, 1165.
1766. Rex v.
Vipont et al.
Paich. 1761.

2dly. The witness was *not examined in the presence* of the defendant: and therefore he did *not hear the evidence*; as far as appears upon this conviction, V. 2 Sir J. S. 1240. *Rex v. Baker.*†

3dly. The witness does not swear him to be a hawker and pedlar at the *time* of the conviction,

Mr. *Wallace* was for the prosecutor. But

THE COURT were unanimously of opinion "That these objections were not well founded." For

1st. He did *appear*, and denied the guilt; but did *not desire further time* to produce his evidence, or to prove his innocence. He seems therefore to have waved any further defence.

2dly. It may be *presumed*, that the witness was examined in his presence.

3dly. There is an inaccuracy in this conviction: but it appears that the defendant exposed his goods to sale, on the 15th; and the conviction was on the 17th.

Per Cur. unanimously,

CONVICTION AFFIRMED.

Rex versus Hann and Price.

Court will not dispense with personal appearance, where sentence may be corporal.

* V. ante,
p. 1716.

MR. *Morton* and Sir *Fletcher Norton* moved, upon Tuesday the 12th of this present November, on behalf of the defendants, who were burrough-justices of *Corfe-Castle*, and had *confessed* themselves guilty of an information * charging them with a very great misbehaviour in the execution of their office, (*viz.* refusing a licence to a public-housekeeper, out of pique and resentment, and upon bad motives, arising from their attachments in respect to a late parliamentary election; and acting therein under the influence of one of the candidates;) for a rule TO DISPENSE with the PERSONAL appearance of the defendants, on the undertaking of their clerk in court "to answer for their fines."

It

It was defended immediately (without any rule to shew cause) by Mr. Serjeant *Davy*, Mr. *Thurlow*, and Mr. *Dunning*, of counsel for the prosecutors. And

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HARR and
Another.

THE COURT upon full debate, were unanimous in refusing the motion,

The general doctrine laid down by the court, and agreed by the counsel on both sides, was that though such a motion was subject to the discretion of the court, either to grant or to refuse it, where it was *clear and certain* that the punishment would NOT be corporal; yet, it ought to be denied in every case where it was either *probable* or *possible* that the punishment would be corporal. And though the court did not then declare what punishment they would inflict upon the present defendants, yet they saw the offence in so atrocious a light, as to be far from determining "That it would be ONLY pecuniary." And Mr. Justice WILMOT and Mr. Justice ASTON thought that even where the punishment would most probably be only pecuniary, yet in offences of a very gross and public nature (as they held this to be) the persons convicted should appear *in person*, for the sake of example and prevention of the like offences being committed by other persons; as the notoriety of their being called up to answer criminally for such offences would very much conduce to deter others from venturing to commit the like.

THE COURT therefore, upon the whole, unanimously denied the motion,

The SENTENCE of the Court now (on this 20th of November) pronounced upon them was, that they should be committed for a month; fined 50 *l.* a piece; and imprisoned 'till the fine was paid,

Russell versus Stewart.

A Motion had been made for the discharge of the defendant out of custody, for want of having been charged in custody, within two terms. The motion was founded upon a rule of this court, made in Trinity term 1716, 2 G. 1. whereby it is ordered "That if any defendant shall be committed to the custody of the marshal, or charged in custody of the marshal, or arrested or committed by virtue of the process of this court to the custody of any sheriff or other

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Defendant who surrenders himself in discharge of his bail, to be discharged for want of being charged in custody, within two terms.

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" other officer whatsoever, at the suit of any plaintiff; and
 " shall so remain in custody for two terms; and the plaintiff
 " shall not declare against such defendant within that time;
 " such defendant, after the end of the second term after
 " such imprisonment, shall be discharged out of the prison
 " where he shall be so detained, on filing common bail
 " signed by one of the justices of this court, without giving
 " notice to the plaintiff or his attorney."

Cause was now shewn: and the question was whether the
 " defendant, who was not in custody upon being TAKEN,
 " but had SURRENDERED *himself* in discharge of his bail,
 " was or was not SUPERSEDEABLE within the abovementioned
 " general rule and its construction, and the practice of the
 " court."

LORD MANSFIELD—No doubt, the *time runs* from the
 time of NOTICE of the defendant's being in custody.

Per Cur.

RULE MADE ABSOLUTE, for discharging
 the defendant out of custody.

* V. post pa.
 2060. Pitt v.
 Yalden 18th and
 29th May 1767.

MEMORANDUM—The debt was a large one; upwards (it
 was said) of 3000*l.* and an * action was brought by the
 plaintiff, soon after this motion, against his attorney Mr.
Palmer, for his *neglect* in omitting to charge the defendant
 within time: which action was tried in *C. B.* about 24th or
 25th June 1766; and * 500*l.* damages given against Mr.
Palmer.

Gray versus Ashton.

Sham demurrer
 evasion of judge's
 order for plead-
 ing issuable.

THE defendant having obtained a judge's order upon
 the terms (amongst others) of "pleading an issuable
 plea," put in a *sham demurrer*.

The plaintiff's attorney, looking upon this as a mere eva-
 sion of the judge's order requiring the "pleading an *issuable*
 "plea," signed judgment; supposing that a *SHAM demurrer*
 is not an issuable plea.

The defendant obtained a rule to shew cause why this judg-
 ment, which the plaintiff's attorney had signed, should not
 be set aside. And cause being now shewn; it was prayed
 by the counsel for the plaintiff, that this rule might be dis-
 charged with *costs*.

THE

THE COURT were of opinion, "That it ought to be
"so."

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GRAY V.
ASTON.

A distinction was taken by the court, between a *real* and *fair* demurrer, and a *SHAM* one: the former is an issuable plea, within the intent and meaning of the judge's order; the latter, is only an *evasion* of it.

RULE DISCHARGED, with costs.

Knox, Esq; *versus* Costello.

Friday 22 Nov.
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One alone cannot bring error on a judgment against several.

THIS was a writ of error from *B. R.* in *Ireland*, to reverse a judgment of their's, affirming a judgment in *C. B.* there, in an action of debt for 1800*l.* brought against *William Knox* by *Christopher Fallon* deceased; and also affirming the adjudication of *C. B.* in *Ireland*, of execution of the same judgment upon writs of *scire facias* issued out of the said court of *C. B.* in *Ireland* against the said *Knox*, at the suit of *Edmond Costello* and *Edmond Fallon*, surviving executors of the said *Christopher Fallon*.

It appears upon the return, that the original action was brought in *C. B.* in *Ireland*, by *Christopher Fallon*; and that he recovered his debt, and also 1*l.* 18*s.* 5*d.* for damages *occasione detentionis debiti*. That a *scire facias quare executionem non* issued, at the suit of the said *Edmond Fallon* and *Edmond Costello*, suggesting "That *Christopher Fallon* was dead, and "that they were his surviving executors." That upon this *scire facias*, the defendant pleaded payment: which was found against him, with sixpence damages. Whereupon it was adjudged, "That they (as his executors) should have execution "against *Knox*, for the debt and damages aforesaid:" and it was also adjudged. "That they do recover against the "said *William Knox* their costs and expences aforesaid, to sixpence by the jury aforesaid in form aforesaid assessed; and "also 1*l.* 14*s.* 8*d.* for their costs and expences aforesaid adjudged to them at their own request, by the court here, "by way of increase according to the form of the statute "in such case made and provided; which said costs and damages, in the whole, amount to 1*l.* 15*s.* 2*d.* and that "the said *Edmond Fallon* and *Edmond Costello* have execution " &c."

Only one of the executors appeared to the writ of error in *B. R.* in *Ireland*, viz. *Edmond Costello*; who, alone, sued out the *scire facias quare executionem non*, in *B. R.* there; and yet that court affirmed the judgment of *C. B.* for both; and the adjudication was "That BOTH should recover."

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KNOX V.
COSTELLO.

This cause came on to be argued upon *Tuesday* last; but was then adjourned; and now stood in the paper again.

Mr. *Ashhurst*, for the plaintiff in error, made these two objections.—

1st. The court below have given *damages* for non-payment of the money: whereas *damages* can not be given in a *scire facias*. 1 Ro. Abr. 574. Letter P. pl. 6. "In a *scire facias*, "no damages shall be recovered." 2 H. 6. 15. nor could costs, till the statute of 8, 9 W. 3. c. 11. "for the better "preventing frivolous and vexations suits." [V. sect. 3.] he also cited 6 Mod. 157. *Fanshawe v. Morrison*, Hil. 3 Ann. B. R.

2d objection.—The *scire facias quare executionem non*, in the *King's Bench* in Ireland is prayed by *Edmond Costello*, only; though the writ of error is brought against the two executors: and yet there is no suggestion "That either of them is dead;" though only one of them appears to it, and prays the *scire facias*.

The case of *Brewer v. Turner* in 1 Sir J. S. 233. is in some degree applicable to the present. The judgment was against two; and was so described in the writ of error: but it was laid to be only *ad grave damnum* of one of them; though it did not appear, that the other was dead. There it was determined "That both defendants ought to join in the "writ of error." here, they ought both of them to be joined.

Mr. *Wallace*, contra, for supporting the judgment in C. B. in Ireland and also the judgment of affirmance in B. R. there.

He allowed the first objection to be good, if well founded: and mentioned the case of *Henriques v. Dutch West India Company*, in 2 Sir J. S. 807, 808. and in 2 Lord Raym. 1532. S. C. where the judgment was reversed for the damages. But he denied that damages are here given for the delay of execution: the words are "only "That he has been damaged "and put to costs." The damages are only 6*d.* on a debt of 1800*l.* and the judgment is "That the plaintiffs recover their costs and expences aforesaid, to 6*d.* by the jury assessed; and for increase of costs and charges 1*l.* and upward.

• The jury find
"That Knox
"did not pay
"the aforesaid
"debt and da-
"mages so as
"aforesaid re-
"covered against
"him by the aforesaid Christopher Fallon by the said judgment in the said several writs of *scire facias* mentioned &c: and that the said Edmond Fallon and Edmond Costello, by the non-pay-
"ment thereof, as executors of the said Christopher Fallon, were DAMNIFIED AND PUT TO
"COSTS, to the amount of *sixpence* sterling."

But

But if it should be admitted "That this is damages for the delay of execution;" yet the judgment ought to be reversed only for the 6*d.* as was done in the case of *Henriques* and the *Dutch West India Company*.

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COSTELLO.

As to the 2*d* objection—No case is cited in proof of it. No objection was made. It was the plaintiff in error's fault, *not to bring in* the other executor. However, one executor alone may call upon the plaintiff in error, to assign errors: and if the judgment shall be affirmed as to one of them, it is and must be affirmed as a good judgment with respect to both of them.

BUT here, the other executor (*Edmond Fallon*) shall be intended to be dead. *Hensloe's case* 9 Co. 36. b.

Mr. *Albhurst*, in reply. The judgment must be reversed *in toto*, if at all.

The 6*d.* is as inadequate a satisfaction for costs, as it is for damages.

LORD MANSFIELD was not in court.

Mr. Justice WILMOT (after stating the case particularly) said "The court ought to support a judgment reversed upon the merits."

This original judgment was obtained so long ago as the twenty-third year of king G. 2. and the plaintiffs below have not yet obtained the effects of it.

The first objection turns upon a fact, which does not support the objection. To be sure, damages for delay of execution can not be given in a *scire facias*; nor could costs, till the statute of 8, 9 W. 3. c. 11. * and if this case were so, • V. Sect. 3. the judgment might be reversed as to the 6*d.* and affirmed as to the rest.

But here, the being "damified and put to costs to the amount of 6*d.*" is only meant as a foundation for the costs *de incremento*: and the judgment is "That the plaintiffs shall recover 1*l.* 14*s.* 8*d.* for their costs and expences, &c."

The 2*d* objection is "That the *scire facias quare executionem non* is brought by only one of these two executors."

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As to the case of *Brewer v. Turner*, in *Strange*, cited by Mr. *Asbhurst*—It may be right: for both are there *plaintiffs*, to reverse the judgment.

But a *scire facias quare executionem non* is only to bring the plaintiff in error in, to assign his errors. He comes in, upon it, and assigns his errors. Therefore he waved any objection, and admitted the one executor to be sufficient to call upon him merely to assign errors. He might perhaps have moved to quash it: but as he did not challenge it, he has waved the objection to it; and we are not to presume the other executor to be alive.

No case is cited to bind us to reverse this judgment: and it can be attended with no inconvenience, to affirm it.

Mr. Justice YATES allowed the principle of the 1st objection; but denied that the fact supported it. "*Damages*" may mean *costs*. The fact is not, therefore, as it has been alleged.

As to the 2d objection—He was very clear, that the judgment ought to be affirmed *in toto*. Mr. *Asbhurst's* case cited from 1 Sir J. S. 233, is not like this case. *Hacket v. Herne*, in *Cartbeu* 7, indeed is a determination "That a writ of error by one alone upon a judgment against two, is not good." But that is upon account of the inconvenience that would arise from a perpetual delay of the execution, if every defendant might bring a writ of error by himself. Now that reason does not hold, in the present case, where these executors are defendants in error, and not plaintiffs.

Mr. Justice ASTON declared himself to be of the same opinion.

Whereupon, by the unanimous opinion of all three, the

JUDGMENT WAS AFFIRMED.

Holcombe and Another versus Wade.

Necessity of attorney for defendant in warrant of attorney to confess judgment, limited to particular causes, upon which party is in custody.

IT was declared by Mr. J. *Wilmot* and Mr. J. *Yates* (Lord *Mansfield* being absent, and Mr. J. *Aston* silent) that the general rule of P. 15 C. 2. about the necessity of an at-

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torney for the defendant being present, * whenever a person in custody gives a warrant of attorney, "TO CONFESS JUDGMENT," is confined to judgment in the particular cause whereupon he is in custody; and does not extend to warrants of attorney given "To confess judgments in OTHER actions." And this, they said has been so settled. [V. 2 Ld Raym. 797. *Finn v. Hutchinson*: where it is settled; and the reason of the rule is given.] *Giltman v. Will. ent. 1st. Charles v. Shepher 4 T. Rep. 439.*

custody by arrest, any warrant to acknowledge a judgment, but in the presence of an attorney for the defendant.

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Hol COMB and Another v. WADE.

* This rule forbids bailiffs and sheriff's officers to exact or take from any person being in their

Harvey versus Peake.

MR. Cox, on behalf of the defendant, had moved on Tuesday the 19th instant, in arrest of judgment: and one of his objections was to the manner of joining issue. For that this issue was joined (or rather not joined) in these words—"Et predictus A. P. similiter;" which was a repetition of the same name (viz. that of the defendant;) instead of saying, "Et predict. the plaintiff similiter;" so, that, in effect, the party has joined issue with himself.

Judgment not to be arrested, because in joining issue plaintiff says the defendant likewise instead of the plaintiff likewise.

Lord MANSFIELD advised Mr. Cox to drop this objection to the want of joining issue; and to rely on his other objections in arrest of judgment.

However, Mr. Serjeant Forster now renewed it; observing that this was the plaintiff's own mistake; and not the defendant's: and he cited Comyns 376. *Walker v. Lester*, and 2 Sir J. S. 417, *Heath v. Walker*, to prove it fatal.

But the three judges (Lord Mansfield being now absent) over-ruled it upon

Mr. Justice WILMOT's rehearsing the case of *Probyn v. Chunchman*, M. 5 G. 2. B. R.: (which I took the liberty of mentioning to have been since confirmed by a later one of *Cleaver v. Jordan*, Mich. 7 G. 2. 1733. B. R.)

The RULE for shewing cause why the judgment should not be arrested, was DISCHARGED.

N. B. That Lord Chief Justice Lee (then only Mr. Justice Lee) did, in both the last-mentioned cases, cite another case: of *Rawbone v. Hickman*, in P. 9 G. 1. in this court: which was debt upon bond; and the defendant pleaded "Solvit ad diem," et hoc petit quod inquiretur per patriam. The plaintiff said

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HARVEY V.
PEAKE.(1. Black. Rep.
575. S. C.)
Saturday 23
Nov. 1765.Conveyance of
an infant mort-
gagee is binding,
and cannot be
avoided by entry
during infancy.

said, "*Et prædict. the defendant similiter.*" This was moved in arrest of judgment: but the objection was over-ruled; and judgment affirmed.

Zouch, ex dimiss. Abbot and Hallet, *versus*
Parsons.

THIS was a special case in ejectment: and the question was "Whether an INFANT's conveyance *by lease and release* was *absolutely VOID*, or only *VOIDABLE*."

This cause had been twice tried. Upon the first trial, an incomplete case had been drawn up and agreed upon; which having been argued on *Friday 17th June 1763*, by Mr. Serjeant *Glynn* for the plaintiff, and Mr. *Dunning* for the defendant, LORD MANSFIELD then observed, that many circumstances were necessary to be known, besides those contained in the case as it then stood; which was not sufficiently stated, to come at the merits: and if the parties could not agree upon the facts, the cause must be tried over again, and those facts ascertained. It was therefore adjourned at that time, in order for the necessary facts and circumstances to be more completely stated: and, the parties not agreeing to them, a second trial became requisite.

It was tried this second time, at the lent assizes 1764 for *Somersetshire*, before Mr. Justice *Kates*; when a verdict was found for the plaintiff, subject to the opinion of this court, upon the following case.

Special case. *John Bicknell*, being seised in fee of the messuage and lands in the declaration mentioned, by indenture of lease and release dated 24th *March 1750* and 25th *March 1751*, conveyed the premises to *William Cook* and his heirs, by way of mortgage, for securing the repayment of 280*l.* *William Cook* afterwards died, leaving *John Lamb Cook*, AN INFANT, his eldest son and heir at law; and also leaving his widow *Elizabeth Cook* and the said *John Lamb Cook* his joint-executors and residuary legatees.

John Bicknell, the mortgagor, afterwards brought the title-deeds of the premises to one Mr. *John Williams* an attorney, and desired him to procure the sum of 400*l.* upon the same security; in order to pay off the said mortgage to the *Cooks*, and for other purposes. *Williams* applied to the lessors of the plaintiff, who agreed to advance the same: and by indentures of *lease and release* bearing date respectively on the

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29th and 30th of June 1761, between the said *John Lamb Cook* (then being an infant of between 16 & 17 years of age) and the said *Elizabeth Cook*, of the 1st part; the said *John Bicknell* of the 2d part; and the said *Henry Abbott* and *Catharine Hallett*, (lessors of the plaintiff) of the 3d part; the said *John Lamb Cook* and *Elizabeth Cook*, in consideration of the sum of 280*l.* in the said release mentioned to be to them paid by the lessors of the plaintiff, granted and released, and the said *John Bicknell*, as well for the consideration aforesaid, as for the further sum of 120*l.* to him mentioned to be paid by the said lessors of the plaintiff, granted ratified and confirmed the said premises to the said *Abbott* and *Hallett*, and their heirs, to hold to them their heirs and assigns for ever.

The said *Mr. Williams* when he drew the last mentioned mortgage-deed, apprehended that the whole principal sum of 280*l.* continued due to the representatives of the said *William Cook*, upon his said mortgage; and therefore expressed that sum to be the consideration paid to them: but, in fact, the sum of 100*l.* only principal money, and 9*l.* for interest, then remained due thereon; the said *William Cook* having been paid the other 180*l.* in his life-time; and accordingly, at the time of the execution of the said last mentioned indentures of lease and release, *Elizabeth Cook* received 109*l.* being the principal and interest then remaining due to her son and her as representatives of her late husband, upon his mortgage; and the residue of the sum of 400*l.* was received by the said *John Bicknell*, from the lessors of the plaintiff.

The said *John Bicknell* continued in possession of the premises from the time of his conveyance thereof to the said *William Cook*, until the year 1756; when he conveyed the premises, by way of mortgage for 200*l.* to one *Thomas Thorne*, for a term of years, who in March 1762 assigned the said term to the defendant *Henry Parsons*, in consideration of the sum of 228*l.* in the said deed of assignment mentioned to be the principal, interest and costs then due from *Bicknell* to the said *Thorne*: but before the assignment to the defendant, *Mr. Williams*, then being attorney for the lessors of the plaintiff, gave the defendant notice of the mortgage made to *William Cook*, and of the assignment of it to the lessors of the plaintiff.

On the 27th day of March 1764, two days before the day of holding the assizes at Taunton, the said *John Lamb Cook* made an entry on the premises, in order to avoid his said lease and release to the lessors of the plaintiff.

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Zouch ex  
dimiss.  
Abbott and  
Another v.  
Parsons:



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dimiss.  
ABBOT and  
Another v.  
PARSONS.

The question is "Whether the lessors of the plaintiff are entitled to recover the premises."

This new case was argued on *Friday* the 8th of this month, by Mr. Serjeant *Glynn*, for the plaintiff, in support of the infant's lease and release; and Mr. *Dunning*, for the defendant, who insisted upon their being *absolutely void*.

Mr. Serjeant *Glynn* urged, that infancy is a personal privilege; and that the infant *only* can avail himself of his infancy: no *other* person can do so. He cited *Whittingham's* case 8 Co. 43. as an authority for him; though he owned that this case is not quite conclusive, as it is confined to *feoffments*. Yet it shews, that privies in estate (as joint-tenants,) and privies in law (as lords by escheat,) shall not take benefit of the infancy of another. And this doctrine, he said, applies to ALL OTHER conveyances whatsoever.

If the infant does *not* object, it is good against all the world. He cited *Co. Litt.* 377. *Co. Litt.* 51. *Bacon on Uses*, 355. and he added, that the doctrine is clearly stated in *Humphreston's* case in 2 Leon. 216, 218, and *Moore* 105. S. C. (there called *Lane v. Cooper*;) the 7th point of it.\*

\* V. S. C. in  
Bendl. 195.  
Owen 64. Dyer  
337. a. and 1  
And. 40.

It is *not* a NULL agreement; because the person of full age is *bound*: the choice of standing to it, or not agreeing to it, is not reciprocal.

Therefore *John Lamb Cook's* act was good at the time; and *stands* good: and the plaintiff has a good title to recover *now*.

The great point to be attended to, is the BENEFIT of the infant.

In the case of an infant's making a lease without reserving rent, it must therefore be void. But a lease made merely in order to bring an ejectment, is good: for, there the infant is not prejudiced.

*Here*, the infant is not, *can not* be prejudiced.

The mother alone, being joint-executor with him, had a right to receive the money, and give a discharge for it: and after it was received, the infant was only a trustee.

There-

Therefore even with regard to the *infant*, it is not a void act; but only *voidable*.

Mr. *Dunning*, for the defendant, the second mortgagee, agreed that both the first and second mortgagee were *equally* intitled to favour; and that therefore *strictness* of law must prevail.

This is not a case, he said, where the court of chancery would have *compelled* the infant to do what he has done.

The Serjeant's proposition is "That the infant's act is good, *till* dissented to by him, when he comes of age." But I say, that his dissent shall have a *retrospect*: it *rescinds* his act, and makes it void *ab initio*. And he may avoid it at any time; either at the *instant* he comes of age, or *earlier*. It was formerly a doubt, whether a *dum fuit infra etatem* would lie, *after* the infant's coming of age.

He argued that this conveyance by *lease and release* was absolutely void. A feoffment and livery of seisin *personally and actually* given by the infant, was the only method that could have made it only *voidable*.

A defeasible estate is not the effect of *every* sort of conveyance. (And here he went into deep and ancient law concerning the different sorts of conveyances, and the different operations of them.\*) He cited *Bro. Abr.* title *Coverture* \* v. ante; and *Infancy*, pl. 1: where it is said "That a feoffment and livery made by an infant *himself*, and *not* by attorney, is *voidable*, and *not* void: *nota diversitie*." 26 H. 8. 2. 92. and 719 to 716.

*Whittingham's* case, 8 Co. recognizes the difference between *personal* delivery of seisin, and a delivery of it by *letter of attorney*. (see pa. 45. a.) The *delivery* alone is the foundation of the *voidable* estate: and the reasoning cannot therefore be applied to any *other* sort of conveyance than a conveyance by *livery*.

He cited a case of the daughters and coheiresses of one *J. Frevil*, in (9 H. 6. fo. 6. pl. 14.) and argued from it, that a feoffment by an infant, without livery of seisin *actually and personally* given by him, is *void*; though a *voidable* estate passes by his *personal* livery.

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simili.  
ANNOT and  
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And an infant's personal livery will create a voidable estate, whatever age the infant be of. Therefore though an infant's actual personal livery be good, till avoided; yet it is otherwise, where his livery is not personal.

The distinction I have taken is clear and common; and is laid down in express terms in *Finch's Law*, lib. 2. pa. 102. [qu. where: for it is not in p. 102.]

In 26 H. 8. pl. 2. *Fitz-Herbert* said, that an infant may plead "That he did not grant by the deed," notwithstanding that it be sealed by him; because nothing passed. And if the infant had made livery of seisin at the door of the church, peradventure this might change the case. As if he gives goods, and delivers them himself, he shall not have a writ of trespass; no more than an assise, when he makes livery and seisin himself: but if he makes a *letter of attorney*, it is otherwise. And *this difference* was granted by *all the court*.

*Brooke* adds, at the end of his abridgment of this case in *Bro. Abr.* title *Coverture and Infancy*, pl. 1. "*Et sic vide que livery dun fait dun enfant nest semble al livery de terre ou biens per luy.*"

Yet I own, that pl. 12. of the same title seems contradictory: and it is copied into *F. N. B.* title "*Dum fuit infra etatem.*" (V. new edition pa. 426. in margine.) Here, indeed, the livery of the deed and the livery of the land are confounded. But the Year-Book (upon looking into it) appears to be misrecited: and such a question could not arise. In *Cro. Car.* 103, *Sir Thomas Holt v. Sambach*, the infant's grant was agreed to be void as to the remainder. And in *Thompson v. Leach*, 3 *Mod.* 301. and *Carth.* 435. S. C. It was holden "That a *surrender* made by an idiot or by an infant is void *ab initio*; and that any person may take advantage of it."

A *surrender* by an infant cannot be by deed, but is *absolutely void*. *Lloyd v. Gregory*, *Cro. Car.* 502; 1 *Ro. Abr.* 728.

The case of *Thompson v. Leach* is the fullest reported in 3 *Mod.* 301: and there, an infant's *surrender* was considered as *absolutely void*. A clear distinction was also taken between the deed *itself* of an infant, (the form of it,) and the *operation* of the deed: and it was determined, that all deeds by infants, and all surrenders by infants, are *void ab initio*.

It

It is only feoffments with actual personal livery that are VOIDABLE only. Bro. Abr. title Coverture and Infancy, pl. 40. referring to 34 Affise, pl. 10. says "Tenetur clerement, que release enfant de tout le droit en terre de que il ne fuit unques seisie, est void &c: mes aliter dicitur dun feoffment. Le reason del diversitee semble per reason del livery del terre. Ceo nest que voidable; et laider est void."

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Therefore an infant's RELEASE is VOID, not voidable only.

Lord Coke had not considered this subject, or at least not expressed himself upon it, with his usual accuracy. In 1 Inst. 51. b. and in 247. b. he does not distinguish between the different conveyances: and he makes entry equivalent to livery. So, in 2 Inst. 673, on the statute of 27 H. 8. c. 16. concerning inrolments of bargains and contracts—He plainly considered the deed as absolutely void—"If an infant bargain and sell lands which are in the realty by deed indented and inrolled, he may avoid it when he will: for the deed was of no effect to raise an use &c." So in 1 Inst. 45. b. (for want of considering the different forms of conveyances—) he is not accurate.

In the case of *James, ex dimiss. Aubrey v. Jenkyns, Tr. 31 G. 2. C. B.* a lease by tenant for life was holden voidable only, where the lease for lives was made by livery. Therefore Lord Coke must be understood of such conveyances as operate BY LIVERY.

As to infant's leases—The benefit of the infant is considered. His leases are good, if a rent is reserved upon them. But this exception arises from necessity; like contracts for meat &c. He cannot occupy his lands himself: therefore it is necessary to validate his leases reserving rent. But this exception extends to no other case.

And it is just the same, whether the infant be six years of age, or sixteen: there is no line drawn between the different ages of an infant.

The legislature have recognized the law to have been as I say. And the act of 7 G. 2. † c. 19. rectifies the inconvenience, in one respect, as to infant-mortgagees.

† He manifestly  
meant 7 Ann.  
c. 19.  
V. post. 1803.

An infant's conveyance by lease and release is absolutely void. The deeds are substantially bad; though "Non est factum"



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can not be pleaded to them. This conveyance never conveyed any interest whatsoever: and the plaintiff can neither have judgment for his term, nor even for damages; by reason of the retrospect.

Mr. Serjeant *Glynn*, in reply—, premised, that the court did not mean to introduce a *new* case, upon the second trial: they only meant to take the matter up, as the facts stood and appeared at the *time* of the first trial, when they were defectively stated to the court.

This conveyance was good *till* the infant avoided it.

As to *dum fuit infra aetatem*—What Mr. *Dunning* says is not inconsistent with what I have urged.

But there is no case to support his doctrine of a *retrospect*, as he has laid it down.

As to the citation from *Bro. Abr.*—It does not follow “That all other acts of an infant are void.”

The entry (upon an *exchange*) is not analogous to livery and seisin: an entry upon an *exchange* does not make a discontinuance.

*Partitions* by infants are only voidable, not void.

So, *leases* by infants without reserving rent.

The law only prevents the infant from being injured.

As to the *grant* of an infant—He may consider it as a *voidable* act: but it is *not a nullity*. And the term “VOID” means only (in several of the cases cited) “That the infant *may avoid it*.”

As to the case of *Thompson v. Leach*—The person who was to avoid the act was the *heir* of the person who did the act.

A release of a right differs from releases which *convey* interests.

No *stranger* has a right to say, “That *John Lamb Cook*’s conveyance was a *void* one.”

The act of parliament mentioned by Mr. *Dunning* does not recognize the law to have been as he supposes.

Lord MANSFIELD, after stating the case minutely, now delivered the resolution of the court to the following effect.

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The merits of this cause turn upon two general questions;  
1st. Whether this conveyance is good, and *binds the infant*;  
2dly. If it does not bind the infant, — Whether the *defendant*  
can *take advantage* of the infancy, and on *that* account object  
to it.

As to the first—Miserable must the condition of *minors* be; 1st. General  
excluded from the society and commerce of the world; de- question.  
prived of necessaries, education, employment, and many ad-  
vantages; if they could do *no* binding acts. Great inconve-  
nience must arise to *others*, if they were *bound* by no act.  
The law therefore, at the same time that it protects their im-  
becility and indiscretion from injury through their own im-  
prudence, enables them to do binding acts; for their *own be-*  
*nefit*; and, without prejudice to themselves, for the benefit  
of *others*.

To mention a rule or two; the reasons of which are appli-  
cable to the present case.—

If an infant does a *right* act which he *ought* to do, which  
he was *compellable* to do, it shall *bind* him: as if he makes  
*equal partition*; if he *pays rent*; if he *admits a copyholder*, upon  
a surrender. But there is no occasion to enumerate instances:  
the authorities are express; and the reason, decisive—"Ge-  
nerally, whatsoever an infant is *bound to do by law*, the same  
shall bind him, albeit he doth it *without suit of law*." \*

\* Co. Litt.  
172. a.

The 2d resolution in *Conny's case*,† is, "That although † 9 Co. 85. b.  
" the infant in the case at bar was not compellable to attorn,  
" because the manor was not conveyed by fine; yet, because  
" by a *mean*, he was compellable to attorn, scilicet, if a fine  
" had been levied, the attornment was good." *Fortescue*  
lays it down larger, 18 H. 6. fo. 2. a.—He did but that  
" which he *ought* to do: *therefore* the attornment is good."

" The attornment of an infant to a grant by deed is good  
" because it is a *lawful act*: albeit he be not, upon that grant  
" by deed, compellable to attorn." Co. Litt. 315. a. The  
reason is manifest—A *right* and *lawful act* is not within the  
*reason* of the privilege; which is given, to *protect* infants from  
*wrong*. His being compellable by *any mean*, or in *any way*  
to do it, proves the act to be substantially what he ought to  
do.



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In the case of *Holt v. Ward*—The infant's being compellable by the ecclesiastical court would have answered the objection made there, as much as her being compellable by the common law; therefore civilians were heard.

To what end should the law permit a minor to avoid an act, which, in any way, through any mean, by any jurisdiction, he might be compelled to do over again, after it was undone? it would be assisting him to vex and injure others, without the least benefit to himself.

Another rule, which may be collected from the books, is "That the acts of an infant, which do not touch his interest, but take effect from an authority which he is trusted to exercise, are binding": as, where an infant-patron presents; an infant-executor duly receives and acquits, pays and administers the assets; an infant-head of a corporation joins in corporate acts; an infant-officer does the duty of an office which he may hold.

A third rule deducible from the nature of the privilege, which is given as a shield, and not as a sword, is "That it never shall be turned into an offensive weapon of fraud or injustice." As where tenant for life and infant in remainder levied a fine,—The infant reversed the fine, as to himself, for the inheritance, for nonage: yet he shall be bound by his assent to the fine and joining in it, not to enter for the forfeiture. And the fine was held good, as to the estate of tenant for life; and reversed *quoad* the infant only. *Pigot v. Ruffel*, 2 Leon. 108. Cro. Eliz. 124. S. C.

To see whether the reasons of these rules are applicable in the present case, it is necessary to ascertain what is in truth the nature of this transaction.

Part of the personal estate of *William Cook* consisted of 109 l. due from *John Bicknell*, secured by a mortgage in fee. His widow and infant-son were joint executors, and residuary legatees; and as such, intitled to this money. The fee which descended to the son was merely as a pledge for the money: besides the money, the infant had no beneficial interest in the land whatsoever. Upon payment, he was bound to convey, as the mortgagor should direct.

Conveying is no more than delivering up a security when it is satisfied. The money here was paid to the proper hand.

An

An adult, under the same circumstances, would have been guilty of a breach of trust; if he had refused: he would have been compelled to do it, and would have been condemned in costs for refusing.

By act of parliament 7 Ann. \* the infant was compellable to do it, during his minority.

It is much *stronger* here, that the money was paid by the plaintiffs; who, upon the faith of this conveyance, and the title deeds produced by *Bicknell* the mortgagor, advanced more money.

The whole beneficial estate belonged to *Bicknell*, after paying the 109 l. The infant's conveyance was matter of form, and in the nature of an *authority*, executed by *Bicknell's* direction, in favour of a third person who ventured his money upon the faith of it.

It would be *iniquitous* in the infant, to avoid it: it would be *unjust*, to set up the privilege, to make an innocent man lose his money, circumvented by his confidence in the infant's concurrence.

But it could not even have that effect. It would be nugatory, and without any effect. For, if it was avoided, he must make the same conveyance over again: he would be compelled to do it. A conveyance to the defendant would be a breach of trust.

By the case stated upon the \* *first* trial, it did not appear that the infant's conveyance was a right act; such as he ought, and was compellable to do. The court then ordered a new trial, to get a more correct state of the case.

\* See the beginning of this case.

Upon the *second* trial, it now comes out clear, that the infant was expressly a *trustee for the plaintiffs*. He was paid by them: upon the faith of the fee being in *him*, they advanced more money.

If the fee was in a *stranger*, the plaintiffs have the *prior* equity. If *Thorne* had been prior; his letting the mortgagor have the title-deeds, might be sufficient to *postpone* him. And the defendant had express notice.

There can be no doubt that the infant was compellable to do what he has done.

Upon

1765

Zouch ex  
dimiss.

Abbott and  
Another v.

Parsons.

\* V. c. 19. § 3



1765.

Zouch ex  
dimitt.  
ABBOT and  
Another v.  
PARSONS.

2d. General  
question.

Upon the first question, we are all of opinion; "That  
" *this conveyance binds the infant.*"

But supposing it not binding against him, or those who may  
stand in his place—

The second question is, "Whether the *defendant* can take  
" *advantage* of the infancy; and, on *that* account, object to  
" the conveyance."

This depends upon two points; 1st. "Whether this con-  
" veyance be *void*; or *voidable* only": 2dly: If voidable only,  
" whether the infant, by his *entry* before the assizes, had  
" *absolutely avoided* it."

It is not settled, what is the *true ground* upon which an in-  
fant's deed is *voidable* only:—Whether "the *solemnity* of the in-  
" *strument* is sufficient"; or "it depends upon the semblance  
" of *benefit* to the infant, from the matter of the deed upon  
" the face of it."

2d. Point of the  
second general  
question.

† Sect. 12.

As to the first, the *solemnity of the instrument*—We think  
the law is, as laid down by Perkins †—That "All *such* gifts,  
" grants or deeds made by infants, which do *not* take effect  
" by *delivery of his hand*, are *void*: but all gifts, grants or  
" deeds made by infants, by matter in deed or in writing,  
" which do *take effect* by *delivery of his hand*, are *voidable*,  
" by himself, by his heirs, and by those who have his  
" estate." The words "*Which do take effect*" are an essen-  
tial part of the definition; and exclude letters of attorney, or  
deeds which delegate a *mere power* and convey *no interest*.

In Bro. Abr. title "*Dum fuit infra ætatem*" pl. 1. (which  
cites 46 Edw. 3. 34.) it is noted "That a *dum fuit infra æta-*  
" *tem* was admitted to lie of a rent: and yet, by some, the  
" grant of an infant was void and not voidable." But (says  
the book) "It is *not* so: for then this action would not lie,  
" And besides, the *delivery* of a deed cannot be *void*; but  
" only *voidable*."

There is no difference, in this respect, between a *feoffment*,  
and *deeds* which convey an *interest*. The reason is the same.

The *delivery of the deed* must be in the presence of *witnesses*,  
as much as the livery of seisin. The ceremony is as solemn.  
The presumption "That the witnesses would not attest, if  
" they saw him an infant," holds equally as to both.

Little.

*Littleton*, who writes with great accuracy and precision, puts them both upon the same foot. He says \* "If before the age of 21, any deed or feoffment, grant, release, confirmation, obligation or other writing be made by any of them &c; all serve for nothing, and may be avoided."

1765.

ZOUCH vs  
dimiss.  
ABBOT and  
Another v.  
PARSONS.

In 2. *Inst.* 673. a bargain and sale inrolled by an infant is denied to be matter of record which the infant must avoid during his minority: but the book says, "He may avoid it, when he will."

\* Sect. 259.

An infant, or they who stand in his place, can not plead "*non est factum*," and give the infancy in evidence; but they must plead the infancy specially, to avoid the deed: and that plea avoids it, by relation back to the delivery. The reason of this is, because it has an operation from the delivery; and not because it has the form of a deed.

The deed of a *feme-covert* has the form: but she may plead "*non est factum*;" because it has no operation.

The distinction between the deeds of *femes-covert*, and of infants, is important: the first, are void; the second voidable.

*Perkins*, sect. 154. \* says—"And it is to be known, that a deed cannot have and take effect at every delivery, as a deed: for, if the first delivery take any effect, the second is void.—As in case an infant makes a deed, and deliver the same as his deed &c; and afterwards, when he comes of full age, delivers it again as his deed; this second delivery is void. But if a married woman deliver a bond unto me, or other writing, as her deed; this delivery is merely void: and therefore, if after the death of her husband, she, being single, deliver the same again unto me, as her deed; the second delivery is good and effectual."

\* Title,  
Faites; pa. 32.

Two objections were made at the bar, to this proposition; at least, in its extent. 1st. That leases by an infant, by deed, upon which no rent is reserved, are absolutely void: therefore, the criterion, "Whether the deed is void or voidable," does not depend upon the delivery; but upon the matter and contents—"Whether it may possibly be for the infant's benefit." 2dly. A surrender by an infant, by deed, is absolutely void: therefore all deeds are not voidable only.

As



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Zouch ex  
dimiss.  
Assor and  
Another v.  
Parsons.

\* V. also S. C.  
in Benlo. 195.  
Owen 64.  
Dyer 337. a.  
1 And. 40.

As to the first—There are many *obiter* sayings; but there is *no sufficient authority*, clearly to outweigh the reasons against this position: I cannot find a case adjudged *singly* upon this ground. What looks the likest to an authority, is the opinion of *Wray* and *Southcote* against *Gawdy*, in *Humphreston's* case, 16 *Eliz. Moore* 105 and 2 *Leon.* 216:\* but there, the judgment was upon the *right* and *merits* of the case, and *not* upon the point of the *lease*. The question, as to the lease, arose upon the fictitious lease to try the infant lessor of the plaintiff's title in ejectment. The two (*Wray* and *Southcote*) held "That, no rent being reserved, there was *no semblance of benefit to the infant*." Whereas, in truth, it was greatly for his benefit. The objection was turning his own privilege of infancy against him, to bar his recovering. Besides, the lease was by *parol*.

But reason soon prevailed; and it has been long settled, "That an infant *may* make a lease, *without* rent, to try his *title*." Very prejudicial leases may be made; though a nominal rent *be* reserved; and there may be most beneficial considerations for a lease though *no* rent be reserved.

What seems decisive is, "That the *lessee* can, in no case, avoid the lease, on account of the infancy of the lessor?" which shews it *not* to be void, but *voidable only*. And it is *better for infants*, that they should have an *election*.

† Lloyd v.  
Gregory is re-  
ported in Cro.

Car. 502. and Sir William Jones 405. and is abridged in 2 Ro. Abr. 24. Title "Eaites," Letter I. pl. 6. and 495. Title "Surrender," Letter F. pl. 7. and in 1 Ro. Abr. 725. Title "Eaites," Letter B. pl. 2. and 3. † 3 Lev. 284. 2 Ventr. 198. 199. 3 Mod. 296, 301, 2 Salk. 618. Parliament-Cases 150. 1 Shower 296. Comberb. 438. 468. Oarthew 211, 435. Equity Cases Abridged, pa. 278. pl. 3. 3 Salk. 300. 12 Mod. 173. and Holt 157, 623.

The case of *Lloyd v. Gregory* was determined upon the special verdict, by three judges; of whom, Sir William Jones and *Croke* were two.

Sir William Jones reports, "That the second lease being void made an end of the question; and that the judges gave no opinion upon the other points."

\* Cro. Jac.  
502.

The note in *Croke*\* does not say a word of the *only* ground of the judgment; but rather supposes the second lease *good*, by arguing, "That there being no increase of term, or diminution of rent, it had no semblance of benefit." *Croke's* note

note might be confounded with what passed upon the trial at bar : for *Roll* states sayings to that effect upon the trial at bar. 1 *Ro. Abr.* 728.\*

But Sir *William Jones* is certainly right : for the *second* lease was *void*. And no surrender, express or implied, in order to, or in consideration of a new lease, would bind ; if the *new* lease is *absolutely void* : for, the cause, ground, and condition of the surrender fails.

In *Thompson v. Leach*, (which was a most favourable case for the plaintiff,) much is said, in argument, "To prove the "surrender of an infant or lunatic to be void ;" to get rid of some doctrine laid down in *Whittingham's* case,† "That the "remainder-man, injured by the act, could not avoid it." But more is said to overturn that doctrine. There is no difference, in this respect, between the heir in tail and the remainder-man : *neither* claims *under* him whose act is in question ; but *both* claim *per formam doni*.

In *Palmer*, 254, † *Dodderidge* denies the doctrine ; and says, "He in remainder, and the donor, *shall* take advantage "of infancy : "which is agreeable to *Littleton's* reasoning "§ 635—it should seem against reason, that a feoffment "made by an infant should grieve or hurt *another*, to take "from them their entry &c."

Suppose the comparison between an infant and a man *non compos* just, (which it is *not*,) the point of "The surrender "being void or voidable" was not necessary to the judgment in that case.

I know of no judgment, upon the ground "That such a "surrender is *void*." Most undoubtedly, the *other* party can not say so. If an infant was to surrender an unprofitable lease ; and, after acceptance, the premises should be burnt, overflowed, or otherwise destroyed ; the *lessor* never could say the surrender was void. There is no instance where the *other* party to a deed can object, on account of infancy. Consequently, the infant may let the surrender stand, or avoid it ; which proves it to be *voidable only*.

If a *new* case should arise, where it would be *more beneficial* to the infant, "That the deed should be considered as void ;" if he might incur a forfeiture, or be subject to damages, or a breach of trust, in respect of a third person, *unless* it was deemed

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Zouch &  
dimitt.  
Abbott and  
Another v.  
Partons.

\* Pl. 3.

† 8 Co. 43.  
H. 45 Eliz.

† In *Darcy v. Jackson* (to the 3d. point of that case.)



1765.

ZOUCH ex  
dimiss.  
ABBOT and  
Another v.  
PARSONS.

deemed void;—the *reason* of the privilege warrant an exception, in *such* case, to the general rule.

*Powers of attorney* are an exception to the general rule, as to *deeds*: and a power to *receive seisin* is an exception to *that*. The END of the privilege is “To *protect* infants.” To *that* object, therefore, *all* the rules and their exceptions must be directed.

But be the point upon the *solemnity of the delivery*, as it may, (for there are respectable sayings the other way;) it is not necessary to our determination. For we are all of opinion, “That the 109 *l.* received, and the other circumstances of “the transaction, *shew a SEMBLANCE OF BENEFIT*, sufficient “to make it *voidable ONLY*, upon the *matter* of the conveyance.”

2d. Point of  
the 2d. general  
question.

If it be *voidable only*, the second point is, “Whether the “infant, by his *entry* before the assizes, (which appears to be “during his *minority*,) has *avoided* it.”

AT the *common law*, the *only* conveyance *in pais*, of the freehold and inheritance of land, with transmutation of possession, was by *feoffment*. If it was tortious, the disseisee was obliged to *enter*, to re-vest his possessory title: and then he might bring an action of trespass. So, in the case of feoffments by an infant; he might *enter during his minority*, to re-vest his possessory right, for the sake of the profits; but still the feoffment was *voidable only*; and he might *elect* to confirm it, when he attained his full age.

The *reason* why an infant can not bring any writ analogous to a *dum fuit infra etatem*, during his *minority*, is, “That “his *election* may not be bound by the judgment.”

Whether an entry be of any *use* in the present case, is not material: it is sufficient, that it can not have any *larger* effect, than in the case of a *feoffment*. The infant is alive, still a *minor*. The defendant can not elect for him: he is a *mere stranger*, in every view; and has no estate affected by the conveyance.

We are all of opinion, “That the *plaintiffs* ought to *recover*.” And it is well for the defendant, we are of this opinion. He would get nothing by defeating the plaintiffs, *here*: for, finally, in *another* mode of proceeding, the conveyance must be *confirmed*; and the defendant would be to pay all the *costs* here and there.

It

It is fortunate for the suitors on both sides, when, consistent with rules and forms of proceeding, *that justice*, which must be the *final* determination of the question, may be done in the *first* stage of the litigation.

1765.

Zouch et  
dimiss.  
ABBOT and  
Another v.  
PARSONS.

The consequence of what has been said, is, that

The *POSTEA* must be delivered to the PLAINTIFFS.

### Peter Gander's Case.

ON a motion made by Mr. Jones, and supported by Sir Fletcher Norton,

The question was "Whether a person was intitled to be discharged under the late  $\dagger$  insolvent debtor's act;" whose case was this—

The man was *not* in the *actual custody of the gaoler*, on the day specified in the act; but was in the custody of an *officer*, in a *house of safety* (a spunging-house.) He was *not* included in the *first* part of the *gaoler's list*: but he was in the *second* part.

Party not in actual custody of gaoler, but only in lock-up-house, not such a prisoner as to be intitled to his discharge under insolvent debtor's act.

$\dagger$  1 G. 3. c. 17.

The court of sessions of London had holden him *not* to be intitled to his discharge, as an object of this statute.

Lord MANSFIELD inclined, that the sessions were in the right; as this was a positive law. And the jurisdiction is given to the quarter sessions: so that there seems no way of coming at it, if they were wrong.

The Recorder was very candid, in offering to come into any method that could be thought of. But

*Per* Lord MANSFIELD—We can do nothing in it.

Rex *versus* Thomas Rogers, Samuel Matthews, and John King.

Monday, 25  
Nov. 1765.

THE defendants were brought to the bar, upon the returns of two writs of *habeas corpus*: the two *former*, from Winchester gaol; the last, from Maidstone.

Issue upon the identity of person is to be tried *instantly*.

They



1816

Michaelmas Term 6 Geo. 3. B. R.

1765.

REG. V.  
ROGERS and  
Others.

They were the felons who broke out of *Maidstone*-gaol, last summer, after having first murdered *John Fletcher* the gaoler, &c; and became a terror to the neighbouring country, for a considerable time.

The respective writs and returns were read: by which it appeared, that they were in custody upon convictions of felony for highway-robberies; and detained upon warrants from the coroner of *Kent*, on inquisitions found for wilful murder.

Then the *certioraries* and returns of the respective convictions for felony in committing highway-robberies were read. It appeared, that *Thomas Rogers* had been capitally convicted of felony for a robbery upon the king's highway; and sentence of death passed upon him: and that *Samuel Matthews* and *John King* had also been capitally convicted for a highway-robbery; and sentence of death passed upon them likewise, for the same.

Mr. Attorney General prayed that they may be asked  
“What they had to say why the court should not proceed to  
“award execution against them upon these attainders for the  
“said felonies.”

Accordingly, they were respectively asked that question.

*Thomas Rogers*, being first arraigned, denied the IDENTITY: and the attorney general averred it. Whereupon a jury was immediately impannelled and sworn.

*Rogers* prayed the assistance of counsel; and desired the court to name one for him: but afterwards, he himself named Mr. *Dunning*.

Proclamation was made: and the indictment read.

N. B. The two others were permitted to sit down, whilst this issue was trying.

Then Mr. *Barlow* (Mr. *Athorpe*, secondary of the crown-office being absent,) charged the jury with the present issue upon the identity of *Thomas Rogers*.

The identity was clearly proved: and the jury found him to be the man.

Mr.

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*Rogers* a  
VOL.

Mr. *Dunning* asked, "Whether he was intitled to a copy of the record."

1765.

THE COURT answered, No: it was refused in Mr. *Charles Ratcliffe's case*.\*

Mr. Justice WILMOT, (the *second* judge) pronounced the award of execution upon the former sentence (for the felony and robbery.)

Then *John King*, being called upon in the same manner, denied the identity: and the attorney general affirming it, issue was joined as before.

Mr. *Dunning* was, at the prisoner's desire, assigned his counsel. He asked time, to take instructions from his client. But

THE COURT denied it; as there was no pretence for it, nor could it be of service to the prisoner. Mr. *Radcliffe's* case was very different from this. There was, in that case, a doubt how he should plead; whether the non-identity, or the act of grace: but in the act of grace, there was an exception of persons who had broken out of gaol; (which Mr. *Radcliffe* had done.) Such issues are to be tried *instantly*: indeed the court may, upon circumstances, give time. But here is no sort of pretence for it.

The jury was sworn, and charged; proclamation made; and the identity clearly proved and found, as before.

Mr. Justice WILMOT awarded execution, as before.

*Samuel Matthews* being called upon, denied the identity; which was averred by Mr. Attorney General: and issue was joined. The same counsel was desired and assigned; and the same jury sworn, and charged; and the same form repeated, as before.

But when the cryer was beginning to make proclamation,

THE COURT stopped him; saying that a proclamation was improper.

The fact being proved; and the identity found;

Mr. Justice WILMOT awarded execution according to the former judgment and sentence; as he had done against *Rogers and King*.

REX v.  
ROGERS and  
Others.

\* It was so.  
(on 24th Nov.  
1746. M. 20  
G. 3. B. R.)  
It was also re-  
fused to Roger  
Johnson,  
Mich. 1728.  
2 Geo. 2. B. R.



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REX v.  
ROBERTS and  
Others.

Mr. Attorney General then prayed execution; and that a particular day might be fixed; and that *Maldstone* might be the place, (at the request of the county.)

THE COURT were of opinion, not only that it was not incumbent upon *them* to name the day; but even that it was more proper for *them* not to do it. It is not usual at the assizes. The sheriff will do as he thinks proper. There must be a rule "To deliver those two that came from *Winchester*, " to the custody of the sheriff of *Kent*, being present here in " court."

\* Sir Richard  
Bentenson, bart.  
was the sheriff,  
and was in  
court.

Take the prisoners from the bar.

Memorandum—

These desperate fellows remained *chained* together, during this whole proceeding.

(1 Black. Rep.  
579. S. C.)

Tuesday, 26  
Nov. 1765.

Information in nature of *quo warranto*, will not lie for encouraging the exercise of a franchise; and doubted whether it will for holding a fair or market.

† N. B. The like motion had been twice denied. *Rex v. Owen et al.* upon the first motion, in H. 12 G. 2. and *Rex v. Anderson*, M. 14 G. 2. for holding a market at *Rawcliffe* in *Yorkshire*.

*Rex versus Marsden et al.*

ON Tuesday the 12th of June last, Sir Fletcher Norton moved for an information in nature of *quo warranto* against the defendants for holding a public FAIR or MARKET, at *Wakefield* on every other Wednesday.

He had moved it a day or two before: but the court had some doubt "Whether such an information would lie;" viz. an information in the nature of a *quo warranto*, in the name of the clerk of the crown, at the application of a private person.

He therefore now endeavoured to shew, that the court had, both upon principle and precedent, a power to grant such an information: and he cited several cases; particularly, 1 *Salk.* 376. *Rex v. Mayor and Aldermen of Hertford*, and 2 *Hawkins P. C.* 262. sect. 7. to shew that all informations in nature of *quo warranto* are within 4 & 5 *W. & M. c.* 18. and the same book and page, sect. 9th. to shew that fairs and markets are franchises that concern the public; and that an information in nature of *quo warranto* will lie in such case; though not for setting up a warren, which is wholly of a private nature. And therefore this case is not like Sir William Lowther's case in 2 Lord Raymond 1409, or Lord Lyburn's case there cited; both which were for setting up warrens. And he said, the 9 *Ann. c.* 20. had no relation to this sort of informations: it relates only to corporate offices.

He

He also cited a case of *Rex v. Daffey et al.* M. 32 G. 2. B. R. and another, of *Rex v. Griffith, Dixon et al.* P. 18 G. 2. B. R. The former, he said, was for holding a market in *Chester*: the latter, for holding a market at *Broseley* in *Shropshire*; where the rule to shew cause was made absolute. [It was *Rex v. Wilkinson and three Others.* V. post 1818.]

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Rex v.  
Mansfield.

THE COURT thereupon gave him a rule; which was drawn up in this form, viz. "To shew cause why an information in the nature of a *quo warranto* should not be exhibited against these persons, to shew by what authority they hold, or promote and encourage the holding of a public shew fair market or sale at a place called *Wakefield-Inge* within the town of *Wakefield* in the county of *York*, on every other *Wednesday* throughout the year, or upon any particular *Wednesday*, for the exposing to sale and buying and selling of all sorts of cattle, goods, wares and merchandizes."

Upon shewing cause now, the counsel for the defendants were Mr. *Wedderburn*, Mr. Serjeant *Burland*, Mr. *Stowe*, and Mr. *Wilson*; and for the rule, Sir *Fletcher Norton*, Mr. *Fearnley*, Mr. *Dunning*, Mr. *Lee*, and Mr. *Wallace*.

The counsel for the defendants said, that as to any private injury the prosecutor may have suffered—he had taken his remedy, by action.

(And it appeared that ACTIONS had been brought, and were now depending.)

And as to the prerogative of the crown—The attorney general is to judge of that. And he will choose to act with caution; if he attends to 2 *Inst.* 282. or the statute of *Gloucester*. The abbot of *Fischamp*'s case, there cited, is very strong, to shew the danger to the officer of the crown from his interfering: for *William de Penbrugge*, the king's attorney, was committed to gaol for prosecuting that *quo warranto* without a precept.

This case is not within those misdemeanors which the act of 4, 5 *W. & M. c.* 18. meant that the court should interfere in. And it is not within 9 *Ann. c.* 20: for it is not a franchise in a burrough or corporation. Indeed, there is not any claim of any franchise at all: no demand of toll; no clerk of the market; no court of piepowder. It is only a private transaction: a sale here would not be within the protection of a market overt. It can't be an usurpation upon the crown, without a demand of toll. 2 *Show.* 201. *Tremaine* 449. S. C.



1765.

REX v.  
MARSDEN & C.

They mentioned *Rex v. Sir Thomas Reynell*, 2 Sir 7. 8. 1161. *Rex v. Wilkinson* 18 G. 2. B. R. and *Rex v. Mary Daffey*, 21 G. 2. B. R.

This is an application by Mr. Scot; who pretends to receive a private injury. But, in fact, he is not injured.

*Wakefield* is a much more convenient place for this purpose, than *Adwalton* is, where the prosecutor has a market: if it was not so, it would sink with its own weight. And it is *no injury* to the proprietor of *Adwalton-market*. In discussing which assertion, he cited *Briton*, 159. cap. 63. and *Bracton*, fo. 235. c. 46. “*Si mercatum aliquod levatum sit, ad nocumentum vicini mercati.*”

The counsel for the prosecutor observed that the defendants had made two objections: 1st. That the usurpation of a fair or market is not, in general, a ground for the interposition of this court, by way of information in the nature of a *quo warranto*; and 2dly. That the present case, in particular, does not afford a foundation for such an information.

To which they answered—1st. The court will always grant such an information where there is an usurpation upon the crown, by which the *public* may suffer: though if it be a *mere* usurpation upon the crown, they will leave it to the care of the officer of the crown, the king's attorney general.

Here, the *public* are greatly interested. Fairs and markets concern the trade and commerce of the kingdom: and the crown can not grant one without previous steps; an *ad quod damnum*, &c.

As to 4, 5 *W. & M. c. 18*.—It extends to *all* informations; to informations in the nature of *quo warranto*, as well as others.

The case of *The Company of Merchants Adventurers v. Rebow*, in 3 *Mod.* 126. 2 *Jac.* 1686. shews that these informations were grantable before that act.

As to *instances*—It falls within the general rule of granting informations where the government or the public are concerned. *Rex v. Wilkinson*, P. 18 G. 2. B. R. for holding a fair at *Broseley* in *Shropshire*, is a precedent: *cause* was shewn; and the rule made absolute. *Rex v. Mary Daffey*, M. 32 G. 2. B. R. for holding a market in *Chester*.

The

The cases of *Rex v. Sir Thomas Reynell*, in 2 Str. 1161. for setting up a ferry at *Laleham*, and *Sir William Lowther's* case in 2 Lord Raym. 1409. taken together, shew that the question turns upon it's being of a private nature, or not. The distinction is between *public* and *private* injuries. And this distinction was antecedent to the acts of parliament of 4, 5 W. & M. and 9 Ann.

1765.

Rex v.  
Mansfield.

Markets and fairs are of a most *public* nature: and somebody ought to be *answerable to the public*. Whereas here is *no check at all*; no authorized *regulations*, even by their own confession: and there ought, in all markets, to be the *privilege and protection of a market overt*.

The 2d objection depends upon *facts*.

All that promoted and encouraged this illegal act are liable to an information for convening and holding this *unlawful assembly* which is a *market* in all respects, but those in which it *ought* to be one. Mr. Serjeant *Hawkins* is of opinion, "That these public meetings &c are not justifiable."

*Toll* is not incident to a fair or market. However, here it is sworn "That they do *collect duties*"; and this is not denied, "That they have collected *stallage or pannage*." So that if they do not meddle with the *onus*, they take the *commodum*. If they can do this, there is an end of any more grants from the crown of fairs or markets.

If it is so convenient; let them apply for a legal grant, and take the proper steps.

The *action* is brought by the owner of another market, for a *private* injury: this information that we pray is *diverso intuitu*, for a *public* offence and usurpation. However, the *action* is *dropped*; it is discontinued: but if it subsisted, it would be an *inadequate* remedy.

Lord MANSFIELD—If it were necessary to determine "Whether the court could grant an information for holding "a fair or market," I should desire time to consider: for, it does not sufficiently appear, whether *before* the \* act, the king's coroner and attorney could file such an information. If he could, the power is *not taken away* from him to do it now by leave of the court: IF he could *not*, 'tis *not* given to him.

\* V. 4, 5 W.  
& M. c. 18.  
V. also 9 Ann.  
c. 20. § 4.



1765.

REX V.  
MARSDEN ET AL.

• 1 Salk.  
374. 376.

In the case first cited, \* it appears that this court, in 12 W. 3. before the act of 9 Ann. granted an information in the nature of a *quo warranto*. And if they did it in *one* case, they may in *others*. The court (taking that power for granted) held that the king's coroner and attorney ought to take a recognizance; and set aside the process, for want of one. But if he could *not* file such an information before, it would be going very far, to say "That *that* act gave him the power of doing it."

† V. & Sir  
J. S. 1161.

*Rex v. Sir Thomas Reynell*, in *Strange*, † is a very short note. But no case or even *dictum* appears, or any instance, where the coroner and attorney did file these informations before the act of 4, 5 W. & M.; nor by the records of the office, is there any sort of proof of it. Therefore I should desire the records to be searched, if it were necessary to form an opinion on *that* point. But that is not, at present, necessary; because I think this rule ought to be discharged on *another* point.

Therefore on the former point, I give *no opinion*, nor have formed any.

But as to the second—Upon the CIRCUMSTANCES of this case, I am clear that there *ought not* to be an information in the nature of a *quo warranto*.

This rule is drawn up, "That the defendants shall shew cause why they hold, or encourage and promote the holding a fair or market."

Now though it were admitted, that an information in the nature of a *quo warranto* might go, to put the defendant to shew by what *title he holds it*; and that therefore the former part of the rule might be right; yet a *quo warranto* will not lie for *encouraging and promoting* the holding one; therefore the rule ought not to have been drawn up in *this form*. Here, all the defendants are *only* encouragers or promoters; no one is charged with actually holding a *market or fair*, or with claiming to hold one. There are no marks of a fair or market; no toll claimed or taken by the lord of the soil. The defendants are only guilty of a *misdemeanour*, at the most; there is no usurpation of a franchise.

Therefore this rule ought to be discharged.

Mr. Justice WILMOT said, he should doubt much if an information in the nature of a *quo warranto* could lie, upon a *private*

a private application, for this usurpation upon the crown; because the defendants could have no costs beyond the 20 l.

1765.

REX V.  
MARSHALL.

However, he gave NO *opinion* on this head.

The reason why a fair or market can not be holden without a grant, is not merely for the sake of promoting traffick and commerce; but also, for the like reason as in the *Roman* law, for the preservation of order, and prevention of irregular behaviour; "*Ubi est multitudo, ibi debet esse rector.*"

Therefore this is not a question "Whether this is or is not a *legal* assembly:" (that is a very different question.)

The present question is "Whether the crown's name can be made use of at the *instance of a subject*, for this particular purpose."

The *immediate* injury is to the crown: the rest is *consequential*.

The old writ of *quo warranto* is a civil writ, at the *suit* of the crown: it is not a criminal prosecution. It probably dropped with *cires*: which is the more likely, because the *quo warranto* was to be determined *in cire*. But be that as it may, this was the true *old* way of inquiring of usurpations upon the crown, by holding fairs or markets; viz. by writs of *quo warranto*.

Then informations in the nature of a *quo warranto* came into use, and supplied their place.

In all the cases I could find, (and I searched all that I could meet with,) all informations of this sort were filed by the attorney general; none by the king's coroner and attorney. And this is natural, and easily to be accounted for; because it is a *private* right of the crown.

How then could the statute of 4, 5 W. & M. alter this? that act was made to *prevent* the master of the crown-office from vexing and oppressing the subject; and intrusted *this court* with the power of inspecting the filing of informations, and seeing that he did not exercise his power to the oppression of the subject, or without sufficient ground and foundation. So that that act was made to *check* and *control* the power of the master of the crown-office; not to GIVE him a right to exercise a power which he *never exercised before*: quite the *contrary*. It is contrary to all principles, to suppose that he



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REX v.  
MANSFELD et al.

\* 1 Salk. 374.  
Rex v. The  
Mayor and  
Aldermen of  
Hertford.

should have such a power. Even *this court* can have no authority, but by common law, or prescription, or by act of parliament.

How CAME, then, the case of *Hertford* \* to extend the recognizance to these cases of informations in the nature of a *quo warranto*? this case I own is a great authority, and staggers one; *otherwise* I should have had no doubt about it. And I think that *that* case ought to be carried *no further* than to CORPORATION-offices.

If any cases are to be found between 4 & 5 W. & M. and 9 Ann. where the master of the crown-office has exercised this power, they would only prove that he had exercised that authority *before* 9 Ann.

But I find no cases that have any weight with me, upon the present occasion. Rex v. + *Wilkinson and Others* was clearly chargeable with an inaccuracy; it was issued *as* upon 9 Ann; which it ought not to have been: and it was *without* argument; at least, *this point* was *not debated*. The other case [*Rex v. Mary Daffey*] was only a rule to shew cause.

No toll was there taken or demanded; nor did any particular person claim the right of holding a market. Yet the court were unanimous in making the rule absolute for the information: and Ld. Ch. J. Lee cited a case of Rex v. Browning et al. for erecting a skin market at Smithfield *bars*, as a strong case in point.

If this matter had depended upon the *former* point, I should have desired time to consider upon so important a point.

But on the *second* point, what my Lord Mansfield has said, is decisive.

Erecting a warren is a *misdemeanour*; yet not within the act: therefore *all* misdemeanours are *not* within it.

If an action is not yet brought, or does not go on; yet an action *may* be brought, in future.

The crown will not grant a fair or market, without an *ad quod damnum*. And if the crown do grant one, yet the owner of another market may bring an *action*, or obtain a *scire facias* against the grant.

This is only a *private* dispute between two private persons about holding this market; which affects, in interest, the market of the other person: it is a dispute about a *private* property, confessedly. Are we, then, to interpose, as for an usurpation of

of a franchise upon the crown? here is *no claim of a franchise*. The *pannage* is only taken *ratione soli*.

1765.

Rex v.

Mansfield &amp; al.

This has not all or any of the great badges of a fair or market; no court of pie-powders, no clerk of the market &c: no person now before the court *claims* such a franchise. Therefore there is no reason for us to grant this information.

Mr. Justice YATES—The first point is a question of infinite moment; “Whether an information in the nature of a *quo warranto*, for usurping a fair or market upon the crown, can be granted upon the application of a private person.”

In informations in the nature of *quo warranto*, there is a punishment for the *misdemeanor*, and also a judgment of ouster of the *franchise*.

A private person may indeed apply, as for the *misdemeanor*: and every usurpation of a franchise is a *misdemeanor*. Therefore I should concur, as to this, in the case of *Hertford*: and with the leave of the court, an information might, I think, be granted for the *misdemeanor*.

But can a *private* person thus call upon another man to *shew his title*, where there is no mixture of *criminality*?

This might be attended with very bad consequences. It might be prejudicial to the crown, by collusion; and it would furnish the subject with means of oppression: and the defendant could have no costs beyond the 20<sup>s</sup>; which in a *quo warranto* information, is an inconsiderable sum; though it may bear some proportion to the costs of an information for a *misdemeanor*.

The statute of 9 Ann. extends *only to corporation-offices*: a fair or market is not within the intention or construction of that act.

But I give *no fixed or determinate* opinion upon this first point; and only throw out what strikes me at present.

On the second point, he concurred with Lord Mansfield and Mr. Justice Wilmot.

Mr. Justice Aston did not think proper to give an *opinion* on a question not necessary to be now determined; and where the proper persons are not before the court.

The



1765.

REX v.

MANSFIELD.

The crown might bring a *quo warranto*; on the subject, an affize of damages.

But he would give no opinion, he said, "Whether the subject can demand of another person to shew his title to hold a fair or market, in *this* method of application."

He added this further—I find I have a case that has not been mentioned before: it was in 14 G. 2. B. R. *Rex v. Owen et al.*† Where an information in nature of a *quo warranto* was prayed for holding a market at *Llanbrinmair*; in which, this point was much discussed, but not settled.

† I have very full notes of that case. It was first moved, and denied, in H. 1738. 12 G. 2. It

came on again, in Trin. 1739. 13 G. 2. and a rule made to shew cause. It came on again in P. 1740, 13 G. 2. and again, in H. 1740, 14 G. 2. when the rule was (of course) made absolute against several of the defendants who neglected to shew any cause; but was discharged as against Mrs. Owen and her son; because they had neither taken toll, nor set up or encouraged the market, nor pretended any right to a market, but, on the contrary, disclaimed it. The rule in *Rex v. Peels et al.* H. 10 G. 1. and the rule in *Rex v. Browning et al.* Trin. 10 G. 1. were there produced: both which were made absolute. They were for setting up skin-markets in *Smithfield*.

The taking *pannage* weighs nothing with me; because the owner has a right to the *soil*.

I have no notion that 4, 5 W. & M. can EXTEND the power of the master of the crown-office. It is *restrictive* of his filing oppressive or malicious informations: and the court have since that act, always *refused* to grant informations for *trifling* batteries or misdemeanours.

But what guides me in the present case is, that there is not a sufficient *claim of a right* of holding a market or fair charged upon the defendants, by any thing that has been laid before the court. And I think (with Lord Mansfield) that the rule ought not to have been drawn up as it is.

Therefore he concurred.

Sir Fletcher Norton was not satisfied with what seemed to be the court's opinion on the 1st point; and mentioned a case of *Rex v. Gouge*—† for holding a court-leet. And he said he believed there were several such informations granted by the court, in cases *not* within 9 Ann. c. 20.

† 23 G. 2. qu.

Lord MANSFIELD—Any one case of the court's granting such an information *before* the statute would be material: so are all those that granted *since* the statute, if not within the reason of the *Hertford* case. That case goes upon the supposition,

sition, that there was no other way to try it, nor to redress the parties concerned. So does the case in *Strange*. And a constable is within the same reason.

1765

Rex v.

MARTIN et al.

But Mr. Justice WILMOT said, he did not see that these cases were conclusive; because he thought that such informations seemed confined to usurpations upon the crown. He said, he remembered an information applied for and litigated, about a tumultuous assembly at *Brentwood*. He also remembered *Rex v. Owen*: † it was moved by Mr. *Wilbraham*.

LORD MANSFIELD—If the court can do it, then it must depend upon the circumstances of the particular case.

It is said, that in 23 G. 2. an information in the nature of a *quo warranto* was granted for holding a court-leet. Now this is very material; for the case of holding a leet is no more within 9 *Ann.* than the present case is.

It was agreed on all hands, that an *action* would not be an adequate method of determining the merits of the question between the parties.

Upon the whole—

The JUDGES all declared expressly, that they were far from giving any OPINION one way or another upon the first point; but meant to let it remain open to any future light that might be procured upon the subject, by cases or precedents or otherwise, and particularly by searches after what the master of the crown-office had done in these cases, before the two acts of parliament of 4, 5 W. & M. and 9 *Ann.*

As to the 2d point—They were clear and unanimous, that the defendants were not sufficiently shewn to have usurped upon the crown this franchise, of holding or even claiming to hold a fair or market.

RULE DISCHARGED.

On the next day (*viz. Wednesday 27th November*) Mr. Justice *Wilmot* mentioned his note of the case of *Rex v. Owen*, P. 13 G. 2. B. R. and repeated it—Mr. *Wilbraham* moved &c; † and said there was no toll, nor weights or measures; and therefore it was no legal market. *Per Cur.* No market is claimed by any particular persons. If it be attended with inconvenience to private persons who have markets near adjoining it, they may bring their *action*.

† V. ante, p. 1320. et supra.

And



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REX v.

MANSDEN et al.

\* The rule was enlarged; that Ld. Ch. J. Les might look into the affidavits.

† No opinion was given, in P. 13 G. 2.

‡ It was in Trin. 1737, 10 & 11 G. 2. (Saturday 25th June,) for holding a court-leet in the manor of Olveston in Gloucestershire.

§ So have I. It was on Monday 25th Jan. 1741. I find, I have subjoined to the end of my own

note, the following words—"So that it was agreed, that an information would lie for setting up an exclusive ferry across a navigable river; provided the charge was sufficiently made out."

And I find this further addition at the bottom of my note. "However, at the prosecutor's instance, the rule was enlarged." I have made a quere "*why*." \* I suppose it came on again; because my brother *Aston's* note of it is of a future term.

Mr. Justice ASTON—My note is of H. 14 G. 2. [which he repeated.] I took the opinion of the court, the second time it came on again; but not the first time, † when my brother *Wilmot* took his note.

Mr. Justice WILMOT—I have another case: which was in Tr. ‡ 11 G. 2. B. R. *Rex v. Cann*. The chief justice being absent—The judges *Page*, *Probyn*, and *Chapple* refused to grant the information in the nature of a *quo warranto*; because it was a *private* matter, where the party might have a remedy by *action*, if he was prejudiced.

I have also a long note of *Rex v. Sir Thomas Reynell*; § where the court held "That if Sir *Thomas* had claimed an exclusive ferry, it had been the proper subject of an information in the nature of a *quo warranto*."

In P. 6 G. 1. B. R. *Rex v. Nicholson et al*.—Trustees for enlarging the port of *Whitehaven*; an information in the nature of a *quo warranto* was granted; because it was a matter of a *public* nature.

LORD MANSFIELD—You see, these cases support our determination of yesterday: and they also support the general ground upon which the motion was founded.

Mr. Justice WILMOT—They are strong, I own: but that is a matter of future consideration, if any future application shall be made.

LORD MANSFIELD recommended (in such case of any future application,) a search in the crown-office; whether there are many instances of informations in the nature of a *quo warranto* filed by the clerk of the crown, in corporation causes, before 9 Ann.

N. B. The first point stands quite free from bias from any opinion one way or the other; as all the court declared

Michaelmas Term 6 Geo. 3. B. R.

1823

declared themselves open to such conviction or alteration of sentiment, as might arise from precedents which may be produced in future, or from future reasoning upon the subject.

1765.

REX v.  
MARSDEN et al.

*Wharod versus Smart.*

Thursday, 28  
Nov. 1765.

**M**R. *Francis Smart* having brought a writ of error in parliament, upon an ejectment on the demise of *Boughy*,—

Plaintiff in error in parliament upon ejectment, obliged to enter into rule, not to commit waste.

THE COURT obliged him to enter into a rule “Not to commit waste or destruction during the pendency of this writ of error.”

Mr. *Smart* did not oppose it : and accordingly, he entered into the rule ; and also justified (to 400 l.)

The End of Michaelmas Term 1765. 6 G. 3.



## Hilary Term

6 Geo. 3. B. R. 1766.

Monday, 27  
Jan. 1766.

### *Rex versus* Inhabitants of Under Barrow and Bradley Field.

This CASE is already published, in the Quarto-Edition of my  
SETTLEMENT-CASES, Ps. 545. No. 175. with a Note  
upon it. An Abridgment of it may be seen in the TABLE  
to the present Volume.

Tuesday, 28  
Jan. 1766.

### *Wilson versus* Mackreth.

*Trespass vi et  
armis* will lie,  
wherever there  
is an exclusive  
right.

**T**HIS was an action of trespass for entering the plain-  
tiffs close called *Carr-Moss*; and digging and carrying  
away his turf and peat: and the general issue was joined.

It was tried at the last assizes for *Westmorland*, before Mr.  
Justice Gould: and upon the trial it appeared in evidence—

That the plaintiff was seised in fee of a freehold tenement  
in the manor of *Upper Staveley*, whereof Lord *Suffolk* and  
Sir *James Lowther*, Bart. were lords, in which manor there  
is a large waste called *Staveley-Head-Fell*, upon which there  
are divers large mosses, out of which turves and peats are  
usually dug.

That the plaintiff, and all those whose estate he hath in his  
said tenement, hath time out of mind had and used an *exclu-  
sive right* of digging turves in a certain moss in the said waste  
called *Carr-Moss*, marked and bounded out from six other  
tracts of moss in the said waste by certain meer-stones;  
which tracts are and have been also used and enjoyed in the  
like

like manner as turbaries by the owners of fix other tenements, whereof other persons are in like manner seised in fee, and lying within and holden of the said manor; saving that two of the said turbaries have been sold off from two of such tenements, and used by the purchasers.

1766.  
Wilson v.  
Mackenzie.

That all these mosses lie contiguous and open to the rest of the waste; and the other tenants of the said manor, as well as the owners of the said tenements, have common of *pasture* on the said waste, and feed on these mosses, as well as on the rest of the waste.

That the other tenants of the said manor also get turves on other mosses in the said waste, but NOT in any of the above seven mosses.

That the plaintiff and other owners of the seven mosses have sold the peats arising from those mosses respectively.

That the defendant dug and carried away peats in the place in question.

Whereupon a verdict was given for the plaintiff; subject to the opinion of this court upon the following question—

“Whether, upon the above state of the case, this action was maintainable.”

Mr. *Wallace*, for the plaintiff, insisted that he was intitled to maintain an action of *trespass*.

Their objection is “That it ought to have been an action upon the Case.”

To prove that *trespass* would lie in this case, he cited 2 Ro. Abr. 540. Moore 302. *Welden v. Bridgewater*, and Bro. *Trespass* 55.

Here, the plaintiff had an exclusive right, and held it separate from every other right; though charged with an incumbrance for the purpose of pasture only. The plaintiff is the owner of the soil.

Mr. *Wedderburn*, *contra*, for the defendant.

The plaintiff had no right of ownership, either in the soil, or in the profits of the soil. Therefore he can not maintain *trespass quare clausum fregit*.



1766.

WILSON V.  
MACRETH.

This moss has been allotted to several persons, for the purposes of *turbary only*: but other tenants of the manor of Upper *Staveley* have the right of *common* upon it.

This division of this moss amongst the tenants of the seven tenements has been made for the mutual convenience of the general number of the tenants of the manor intitled to *common* of *turbary* for firing.

The plaintiff has *no ownership of the soil*: he has no right to dig for any thing else, *but turf only*. And if the land was drained or rendered fit for culture or pasture, he would have no right to any *improvement* of it. It is only a right of *turbary in gross*.

The cases which have been cited are not applicable. The *vesture* of the land is a right to the land itself.

Mr. *Wallace* was going to reply. But

Lord MANSFIELD said, There wants nothing to answer the objection, but to state the case: which I will do, for the sake of the students.

Then he stated the case, *verbatim*.

The plaintiff's right is in a several piece of ground, butted and bounded; a separate right of property, to take the profit of the turf, and to dig it for that purpose.

The plaintiff has this right *exclusively* of all others. And the defendant has disturbed him in it. Therefore *trespass* lies: though he has not the absolute right to the soil.

Mr. Justice WILMOT—If this was only a right of *common* of *turbary*, *trespass quare clausum fregit* would not lie.

But this is an *exclusive* right to dig turf.

\* V. Co. Litt.  
pa. 4 ab.

It appears from 1 *Inst. c. 1.*\* under the word "*Land*," that it is not necessary he should have the *whole property* of the land.

This must be taken to be a grant from the lord of the soil. He stands in the place of the lord of the manor.

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VOL.

The property of the turf is in the plaintiff. No other person could maintain this action. Therefore he may.

1766.

WILSON v.  
MACKEETH

There is a difference between *exclusive* rights, and right of *common*. In the former case, the grantee may take away thorns cut: but the commoner can not. *Yelv.* 187. 188. *Dewclas or Douglas v. Kendall.* *Gro. Jac.* 256. S. C.

These mosses are *severed*, and six of them enjoyed by other people: therefore decisively a *separate* right. And therefore the plaintiff may support this action of trespass.

Mr. Justice YATES said it was a clear case: for where-ever there is an *exclusive* right, trespass lies. And this is clearly an *exclusive* right.

I do not see that this right differs from a right to a sole and separate pasture, for a *time*; and in that case, during *that* time, trespass lies.

Mr. Justice ASTON was of the same opinion. And he mentioned the case of *Hoe v. Taylor*, in *Moore* 355. where the second error assigned was "That trespass did not lie *quare clausum fregit*; because the soil was not granted." But all the court held "That it *did* lie;" although they granted, that the soil did not pass: for, he who has *herbagium, pastura, &c.* shall have trespass *vi et armis*.

*Per Cur.* unanimously,

Let the *possession* be delivered to the PLAINTIFF.

Rex *versus* Spencer, Common Council-Man of Maidstone.

Wednesday  
29 Jan. 1768.

SIR Fletcher Norton, Mr. Serjeant Leigh, Mr. Burrell, Mr. Ashurst, and Mr. Dunning, on behalf of the defendant, on Saturday last (the 26th of January) shewed cause against arresting the judgment for the defendant, and entering judgment for the king against the defendant. A rule to that purpose had been made on Monday the 11th of November 1765, on the motion of Mr. Cox; who objected to the validity of the by-law under which the defendant justified his election into the office. He urged, that it was a bad by-law, as it restrains and narrows the number of electors without any au-

Number of electors may be narrowed by a by-law, but not the number of the eligible.



1766.

REX V.  
SPENCER.

thority from the charter, and even contrary to it; and without the consent of the electors, takes away their rights; and is vague, indefinite, and uncertain; and that such a restriction of the number of electors can not be allowed in the case of a common council-man's election, whatever might be the case of the election of the principal officer.

Sir Fletcher, having first objected to the rule as drawn up, proceeded to the merits; and urged, that the prosecutor ought regularly and properly to have demurred to the defendant's plea: but as he had elected to plead to issue, he was now bound by the verdict, and could not have recourse to a motion in arrest of judgment.

It was an information in the nature of a *quo warranto* for usurping the office of a common council-man of Maidstone.

The defendant justified under a BY-LAW dated 18 August 1764, and made by the mayor jurats and common council, by virtue of letters patent of 21 G. 2. It recites the power given by the charter "For the mayor jurats and commonalty to elect common council-men;" and recites "That the commonalty were very numerous, and the admission of them to vote at the election of common council-men had been found by experience to be attended with many inconveniences, and had from time to time occasioned divers riots and disorders and great popular confusions, and had very much disturbed and broken in upon the peace good order and government of the said town and parish;" and further recites "That such inconveniences would be likely to be remedied, if the right of electing of the common council were to be confined to the mayor jurats and common council, and such of the common freemen as had executed parochial offices in and for the said town and parish in manner therein after mentioned:" and then (for preventing of the like inconveniences for the future, and for the avoiding of popular confusion and disorder in the election of common council-men,) it ordains "That upon every or any future election of a common council-man or common council-men of the said town and parish, the mayor jurats and common council for the time being, of the said town and parish, and such of the common freemen for the time being, who should reside in, and should respectively have gone through and served for the space of one whole year RESPECTIVELY the SEVERAL OFFICES of CHURCH-WARDEN AND OVERSEER OF THE POOR, RESPECTIVELY, for the said town and parish, or the major part of such mayor jurats common council-men and common freemen QUALIFIED AS AFORESAID, should meet and assemble

" assemble themselves together in the court-hall of the said town and parish; and being then and there so met and assembled together, the said mayor jurats *common council* and common freemen of the said town and parish QUALIFIED AS AFORESAID, or the major part of them so met and assembled together, should, *by themselves*, WITHOUT the PRESENCE or CONCURRENCE of ANY of the COMMONALTY of the said town and parish, *elect and choose* one or more of the principal inhabitants of the said town and parish to be a common council-man or common council-men of the said town and parish."

1766.

R. & V.  
SPENCER.

Note—The CHARTER directs the nomination and election of common council-men to be *by* the mayor jurats and COMMONALTY, and their successors, or the majority of them, out of the principal inhabitants of the said town and parish.

Note also—The new letters patent of incorporation bear date 17th June, 21 G. 2. and incorporate them by the name of "Mayor jurats and commonalty;" to consist of a mayor, 13 jurats (including the mayor,) and 40 common council-men: and power is granted to the mayor, jurats and common council to make by-laws.

To this by-law pleaded by the defendant, the prosecutor replied; 1st. That the common council were not duly assembled; 2dly. That they had no power to make such a by-law: and issue was joined thereupon. Both these issues were found for the *defendant*.

Sir *Fletcher* insisted, on his behalf, that the prosecutor could have no more than a rule to shew cause "Why this judgment should not be *arrested*:" whereas the present rule is drawn up not *only* to shew cause "Why the judgment should not be arrested;" but *also*, why judgment should not be ENTERED "FOR the KING AGAINST the *defendant*."

He then answered their objections to the by-law:—premiſing, 1st. That corporations have incident power to make by-laws. 2dly. That that power is lodged in the body at large; unless placed expressly elsewhere. 3dly. Wherever the crown gives it expressly elsewhere, the power will reside where the crown has vested it. 4thly. Wherever the power is lodged, it is equally strong; it is the legislative power of the corporation, and binds all their members. 5thly. A by-law may, to

Q. 2

prevent



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prevent confusion, restrain popular elections : it may restrain the number of *electors*.

The defendant's counsel then repeated the prosecutor's objections, and answered them.

1st. It is objected, That this is a bad by-law, because it is not warranted by the charter ; which only extends to cases where penalties are annexed ; and that the penalties must be inflicted by the *whole* body.

Answer—But the power of *making* by-laws is one thing ; the power of *annexing penalties* is another. And here the by-law is a good one, though it should have *no* penalty annexed to it. It is, “ To restrain the number of electors to *SUCH of the commonalty as have EXECUTED the office of CHURCH-WARDEN and OVERSEER.*”

Besides, the words do not require such a construction as they put upon them : for the same persons are *intended* to be the makers of the by-law, and the annexers of the penalty.

However, the true answer is “ That the by-law does *not* require a penalty : the members are *amovable*, if they disobey it.”

2dly. It is objected that the by-law is *contradictory* to the charter, which requires the election to be by the body at large : so that it is repugnant to the charter both in letter and spirit.

Answer—The by-law is not contradictory to the charter : for it continues the election in the *same* set of persons, though the *number* of them is restrained. It is restrained to *such* of the commonalty as have served parish-offices : it has only *narrowed their number* ; not taken it from their body. It remains *virtually and substantially* in the same parts of the corporate body.

3dly. This objection was split : and it was said, that the number of electors ought not to be narrowed as to the election of a *common council-man* ; however it might have been, if it had been the *head-officer*.

Answer—But the reverse of this objection is the truth. So that the reasoning holds *inverted*. [V. 4 *Inst.* 48, 49. 4 *Rep.* 77. b. 78, a.]

4th Objection. That the by-law takes away the power of the commonalty, *without the consent* of the commonalty : and the

the case of corporations in 4 Co. 78, and 3 Bulstr. 71. the case of the corporation of Colchester is urged in support of this objection.

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Answer—But wherever the power of making by-laws is lodged, *those persons* have the full power of making them: and the consent of the rest is included.\* Which is an answer to the Colchester case in 3 Bulstr. 71. And the case of corporations in 4 Co. does not affect this case. For there *no by-law* appeared: the judges were *forced to presume* one.

\* V. Jenkins's  
Centuries, pa.  
273. Case 93.

However, it still rests virtually in the body of the commonalty, though restrained as to the particular persons.

They further observed, upon the case of corporations, "That as a by-law was there presumed; and no particular clause in the charter appeared to give a power of making by-laws; it must be presumed to have been made by their incidental power, and consequently to have been made by the whole body." They also observed, that the body at large having themselves chosen the common council, the body at large might be said to have *actually* and *personally* consented to what these their representatives had enacted into by-laws.

5th Objection, That the by-law is vague, indefinite, and uncertain.

Answer—*Id certum est, quod certum reddi potest.* And here it must appear, at the time of election, *who are* those substantial electors, who have served public offices: they are sufficiently described and defined.

They therefore prayed that the rule might be discharged, and the judgment stand.

Mr. Morton, Mr. Cox, and Mr. Wallace, *contra*, *pro rege*.

They admitted Sir Fletcher Norton's two first positions; but denied the third, together with its consequences: and they insisted,

That the valuable franchise of a vote given to an individual can not be taken away without the *consent* of such individual.

That the power of making by-laws is to be taken *strictly*: and therefore this power to make by-laws shall *not be extended* further than what appears to be the manifest intention of the charter.



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And that this by-law does not only restrain, but *totally varies* the mode of election established by a charter not yet 20 years old.

The charter recites the mischiefs and grievances arising from disputes about elections; and was obtained upon the representation of the commonalty. It directs, specifies, and settles a *certain* and *indubitable* method of election, that the town may enjoy peace and quiet. Then it directs and specifies the *particular rights*, and the persons who shall have such rights; and *prescribes the mode of election*: and the mode of election is directed and prescribed, *subsequently* to the clause which gives the power of making by-laws; and it describes what species of by-laws they are to be. Surely, this is a *negative* upon a by-law afterwards made to the contrary of it.

The charter only intended to give the select body a power to make by-laws for correcting offenders, for regulating trade, and matters of the like kind; in short such by-laws as might be enforced by penalties; *not* such as would *take away the rights of election*.

And they can make no by-laws *but* such as are *within* the power given them by the charter. So was the opinion of the Lord Chancellor, in the case of *Child v. Hudson's Bay Company*, 2 Peere Williams 209.

The charter now under consideration expressly gives the right of election to the *COMMONALTY*. But this by-law totally alters overturns and changes the nature of the election: it takes it quite away *from* the commonalty, and places it in a *few housekeepers*, who have served certain parish-offices.

They said, they would not contend for any distinction between the election of *principal* officers of corporations, and *subordinate* ones: (which distinction might perhaps be argued for, from the case of corporations in 4 Co.)

But certainly, an integral part of the corporation can't be struck off: nor can the makers of a by-law take the power of election from those to whom the charter has given it, and place it in themselves. Whereas here the makers of this by-law have, in a great measure, placed the election in themselves. For, as the charter contains a clause of *ne intromittas* as to the county justices, the *burrough-justices* have the power of appointing

ing overseers: and three of these reduced electors are but rough justices by their office.

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The power of voting (a very valuable franchise) can not be taken away without the consent of the voters.

The king himself can not take it away, when he has once given it. A man once possessed of a franchise can not lose it without his own consent. 4 Co. 77. Le Case de Corporations, Bulfr. 71. The case of the corporation of Colchester. Comberb. 316. Rex v. Larwood, and 1 Salk. 190. Butler v. Palmer.

This by-law totally changes the nature of the election: it reduces it from 800 voters to ten. It varies and alters the qualifications of the electors: it does not only restrain their number.

This kind of restriction is what this court will never allow. It is narrowly restrained and limited to those very few who have served the offices of church-wardens and overseers. There is a vast difference between 800 commonalty, and a few parish-officers; some of which are to be appointed by the parson of the parish, and others by the corporation-justices.

Besides, many persons *fine* for these offices, and do not actually serve them: others are privileged by their professions; others are exempted by Tyburn-tickets. Shall these persons lose their right of voting? this by-law flies in the face of the charter, and contradicts the king's intention: and it would not even answer the end it professes, of avoiding popular confusion and disorder.

Upon this first argument,

Lord MANSFIELD said, he saw reason to doubt of the by-law; and desired to consider of it.

It is now settled,\* "That the number of the electors may be restrained by a by-law: but a by-law can not strike off an integral part of them; neither can it narrow the number of the persons out of whom the election is to be made."

\* It was settled, not only in the case of Rex v. Phillips, mayor of Carmarthen, January, 1756, of the eligible."

(hereafter mentioned,) but also in a later case, of Lee v. Wallis et al'. 27th in this court, "That a by-law may narrow the number of the electors, but not

The charter gives the right of election to the commonalty. The by-law restrains it to a few of them; and those few, under a particular description, namely, such as have been



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churchwardens and overseers. The corporation-justices appoint overseers: and several persons may be exempted or excused from serving that office at all. These persons would be totally excluded from ever voting. So that some votes would be preserved, of persons nominated by the mayor and jurats; and others could never vote at all. It deserves consideration, "Whether this is a reasonable restriction;" though this select body have a power given them by the charter to make by-laws.

Mr. Justice WILMOT inclined to think the by-law unreasonable.

He thought, the court ought to take care that the persons impowered to make by-laws, exerted their power in a reasonable manner.

They ought not to take the power of election from others, and place it in themselves. Here, the jurats, &c. being corporation justices, have the appointment of overseers. Consequently, this by-law puts it into their power to say *who* shall be the electors. And, as some of the overseers are to be named by the parson, it so far puts the election into the power of the parson: or, at least, it may put it into the power of other persons, not corporators, who may have the right of choosing church-wardens.

As to the objection of the want of the *consent* of the commonalty to the by-law—He thought them as much included in and bound by a by-law made by the select body, to whom the charter gives the power of making by-laws, as if they had actually given their own consent.

Mr. Justice YATES, and Mr. Justice ASTON thought it bad. A by-law may narrow the number of *electors*; not altering the constituent parts. But here they have gone out of the charter, and imposed *qualifications not mentioned in it*, not at all connected with the corporation.

The commonalty are, by the charter, an integral part of the constitution. And this by-law admits those of them to have a vote, who *have served these offices*; and *excludes* those of them who *have not*; though some of them may be incapable or not obliged to serve them, and though this qualification has *no connexion* at all with the corporation. And the corporation-justices have the appointment of overseers, in their own hands.

In the case of *Rex v. Tucker, mayor of Weymouth*—A by-law by the mayor and aldermen, "That the mayor should be chosen out of the aldermen," was held bad.

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*Rex v. Spencer.*

It was P. 14.

G. 2. B. R. and in *Dom. Proc.* 1742, 3, when the lords affirmed the judgment of this court. The charter directed the election to be made out of four persons to be nominated out of the burgesses or inhabitants at large: the by-law directed it to be made out of four persons to be named out of the aldermen; or at least one of whom should be an alderman.

So here, they have restrained the electors, not generally, but with such a distinction as in effect places the election in themselves.

Lord MANSFIELD said, these observations struck him very strong.

The by-law introduces a new description not mentioned in the charter, nor at all connected with their corporate character, as a qualification to enable them to elect; and excludes such of them from the right of electing, as have not this qualification.

Sir Fletcher Norton observed that this was new matter, as to which he had never been heard.

Lord MANSFIELD—You ought to be heard to it,

Let it stand over till Wednesday.

ADJOURNED till Wednesday the 29th.

On which Wednesday, the 29th. the counsel for the defendant, Sir Fletcher Norton, Mr. Serjeant Leigh, Mr. Burrell, Mr. Ashurst, and Mr. Dunning, endeavoured to answer the objections.

It has been objected, 1st. That an integral part of the corporation cannot be struck off; 2dly. That the by-law places the power in themselves; 3dly. That it imposes a qualification not at all connected with the corporation.

First. The case of corporations in 4 Co. 77. b. 78. a. is an authority for us, standing unimpeached: it was there resolved, "That where the charter gives the election to the commonalty, an election by a certain selected number of the principal of them, commonly called the common council, and not in general by all the commonalty, may be good." The point about an integral part of the electors being



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being excluded, was not determined in the case of *Rex v. Phillpps, in Carmarthen, Trin. 1749, 22, 23 G. 2. B. R.* that determination was, "That a by-law may restrain the number of the electors, but not the number of the objects of election."

Here, the common council are *not* a distinct integral part of the corporation; for they remain part of the commonalty: whereas in *Carmarthen*, the common council were chosen out of the burgeses, and not out of the commonalty; and they had never been part of the commonalty. But this corporation of *Maidstone* consists only of mayor, jurats, and commonalty. Therefore the commonalty are *not* here excluded: it is only a reduction of 800 to a smaller number of the same persons; which is allowable.

Secondly—This by-law does *not* put the corporation into the power of the mayor and jurats, as is objected. For, whatever may be said about the overseers, yet still the church-wardens may very well represent the commonalty: they are not chosen by the burrough-justices, but appointed by quite other persons. The 43 *Eliz. c. 2*, gives the nomination of them to the parish: the justices are, in their case, only ministerial. The power of appointment of overseers is not in them.

In the case of *Rex v. Justices of Dorchester*—upon a mandamus to the justices "to sign a rate"—it was holden "That their signing the rate was a matter of form only": they are obliged to sign it.

If this by-law had in fact tended to place the election in themselves, it would not have made it a bad one: for the court can not get at the fact, how far the balance of influence is altered. And they will not presume any improper design or consequence: so far from presuming that they will act wrong, it shall be presumed that they will act right.

This by-law being made by the persons impowered by the charter to make by-laws, is to be considered upon the same foot as if it had been made by the corporation at large: and they have a right to restrain the number of electors to any number, how small soever. And the very case is put in the case of corporations, 4 *Co.* by way of illustration; it precisely supposes it. And in that case, there was a common council; which must have been by charter, or at least by prescription.

Thirdly—As to the objection "That this qualification does not at all relate to their corporate capacity—"

This

This by-law is only *descriptive* of such of the *commonalty* as shall have a right to vote. It describes the *most substantial* of the *commonalty*, by their having gone through these public offices. And surely, the by-law will not be the worse for *superadding* a qualification. This is *not* introducing a *new* class of men under this description: it is only a restraint of the *same* persons, and confining them to such as are so qualified.

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LORD MANSFIELD—From the cases cited or alluded to, it appears to me, that where the power of making by-laws is by charter *given* to a *select* body, they do *not* represent the whole community; and therefore cannot assume to themselves what belongs to the body at large: but where the power of making by-laws is in the *body at large*, they may *delegate* their rights to a *select* body; who become the representative of the whole community.

Now here the charter appoints the election of the mayor to be by the jurats; and of the jurats, by the mayor, jurats, and common council-men, (excluding *commonalty*); and of the *commonalty*, by the mayor, jurats, and *commonalty*.

I remember, the charter was much litigated at the time of passing it. And it was matter of deliberation, "Whether the power of election should be fixed in the body at *large*, or in the *select* body."

I understand the charter as if it had said in express words "That the *commonalty* shall vote *for themselves*, and *not* be represented by the common council."

It is by no means to be compared to cases where there is a common council who are supposed to have been *created* by the *commonalty*, and therefore have the original power of the *commonalty* in them.

Here the common council is *no part* of the *commonalty*, but a *distinct* body. They are constituted *eo nomine*, as *common council-men*; which is an office for life.

THIS alone, would be a sufficient objection to the by-law.

But further, they have here confined the qualification to what *does not* relate to or concern the corporation; to having been church-wardens, persons appointed annually by the parson; or overseers, persons nominated by the justices.

THIS



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This is an abuse of their power, for the private benefit of those that have exercised it.

I am therefore clearly of opinion "That it is null and void by-law."

Mr. Justice WILMOT declared himself of the same opinion.

The true test of all by-laws is the *intention of the crown* in granting the charter, and the *apparent good of the corporation*. And upon this principle stands the power of controlling by a by-law the words of a charter, as far as relates to the distinction between narrowing the number of *electors*, and narrowing the number of those *out of whom* the election is to be made. A by-law may restrain the number of the *electors*: but it cannot narrow the *objects* of election. The former tends to avoid popular confusion and riot: but that reason does not apply to the *objects* of election. This was settled in the *Carmarthen* case [*Rex v. Philips, jun. mayor of Carmarthen, Trin. 1749, 22, 23 G. 2. B. R.*] and it was there holden "That a by-law can't exclude an integral part of the *electors*."

I do not say, that any integral part is here struck off; which, I think, could not be done.

But a qualification is required, which is neither mentioned in the charter, nor at all connected with their corporate character. The *charter* says the election shall be by the mayor jurats and *commonalty*. The *by-law* says it shall be confined to the mayor, jurats, and *common-council*, and *such of the commonalty* as shall have served the offices of church-warden and overseer of the poor for one whole year.

The charter having named the common council shews that they were meant to be a distinct body or class. No by-law could have confined it to the common council *alone*: neither can a by-law confine it to *such* of the *commonalty* as are under such a qualification as is here required.

The crown have added no qualification to the votes of the *commonalty*. The by-law cannot superadd a qualification when the crown have not; and which has no relation to or connexion with their corporate character and capacity. It is in the teeth of the grant.

Besides,

Besides, this is, in effect, putting the power in *themselves*: for they have the nomination of *overseers*. The *church-wardens* are not, indeed, appointed by themselves: but they are appointed by strangers to the corporation. The makers of the by-law had no right to impose such qualifications.

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Therefore this by-law is *void*. It not only restrains the number of electors, but *imposes qualifications contrary to the intention of the charter*. Therefore it is not justified by the case of corporations in 4 Co. 77, 78.

Mr. Justice YATES—Corporations cannot make by-laws *contrary* to their constitution. If they do, they act without authority. This by-law is made by the mayor, jurats, and common council; to whom the power of making by-laws is given by the charter.

The common council can't be considered as the representatives of the whole body of the commonalty.—The common council mentioned in this charter, are plainly a distinct body from the commonalty.

This by-law was not *actually* made by the whole body.

The *Carmarthen* by-law was supposed to be a by-law made by the *whole* body: so was the case of corporations in 4 Co. whereas, here, the mayor, jurats and common council, (which common council are a distinct body from the commonalty,) make the by-law, and place the election in the mayor, jurats *and common council*, together with a part of the common freemen.

*This* part of the by-law I therefore hold to be unreasonable, illegal, and bad.

Then as to that part of it which imposes the qualification upon the freemen—It requires from the electors appointed by the charter, a qualification not mentioned in the charter; the having executed quite distinct offices, not at all connected with the corporation. I can not conceive that even the *whole* body could have thus *varied* an *essential* part of their constitution.

These officers (church-wardens and overseers) are alien to the corporation; and depend upon the will of others, and partly upon the nomination of some of the very makers of the by-law.

The by-law is, in my opinion, clearly *void*.

Mr.



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Mr. Justice ASTON—The common council, though part of the corporate body, are a *distinct class* from the commonalty: they are part of the select body to whom the power of making by-laws is given. A by-law may narrow the number of the *same* electors: but it can not *transfer* the right of election to *different* persons.

There was no common council distinct and as a select body, either in the *Carmarthen* case, or in the corporation case in 4 Co. 77. b: therefore they remained as part of the general body: here, they are a distinct class.

The intention of the whole charter is to be considered in the construction of it.

You can not change the right of the electors from one body to a different body, or *intermix* other persons with those who have the right in them.

THIS by-law is a manifest scheme of the makers of it, to put the power of election in themselves.

And the qualification here annexed is a suspension of their right, *till* they shall have served these offices, respectively, for a whole year: so that it is a suspension for *two* years, at the least. There is no end of qualifications of this sort.

It is a *bad* by-law.

The by-law being thus holden to be bad, the judgment was ARRESTED. And the court declared, that there ought to be *no costs* of the trial or motion, on either side.

V. post. pa. 2204. *Rex v. Cutbush*, 30th April 1768.

Saturday 1 Feb.  
1766.

### *Rex versus* Inhabitants of Silchester.

This case is already in print. It is *abridged* in the TABLE. See it at *large* in my SETTLEMENT-CASES, No. 176. pa. 551.

Fotterel

Fotterel *versus* Philby.

1766.

Monday 3 Feb. 1766.

**M**R. Stowe shewed cause against the defendant's being discharged out of the custody of the marshal; a rule for that purpose having been made on Sir *Fletcher Norton's* motion, upon the following fact, *viz.*

If committitur is not entered on record within two terms, prisoner is intitled to his discharge.

A committitur in execution was entered in the marshal's book: but no committitur-piece was filed; nor was the committitur entered ON RECORD within two terms.

In 2 *Strange* 1215, *Unwin v. Kirchhoffe*—The court held "That the committitur must be actually entered \* on record before the end of the second term."

\* *V. Post Woodbridge v. Forth Esq; B. R. 11th July 1773. Trin. 13 G. 3. accord.*

Here is no entry of the defendant's commitment on the ROLL; nor any committitur-piece filed, to authorize it's being so entered on record.

Therefore Sir *Fletcher* prayed that the rule might be made absolute for discharging the man: and

The RULE was made ABSOLUTE accordingly.

Rex *versus* Crookes.

Wednesday 5 Feb. 1766.

**T**HE Court refused to *quash* UPON MOTION an indictment found at the quarter-sessions for *selling by false weights*; though Mr. *Wallace* made two objections: *viz.* 1st. That the charge was "That the flour-scale was the 'lighter'; from whence he inferred that the defendant must injure *himself*, not his *customers* who bought flour of him: 2dly. That the charge was only of selling by those false scales, *generally*, not *saying where*; so that it did not appear that the offence was committed *within the jurisdiction* of the justices.

Court refused to *quash* upon motion, indictment for selling by false weights.

THE COURT said they were NOT OBLIGED to *quash* on motion: and as this was an indictment for such an offence, they might *demur* to it.\*

They afterwards refused to *quash*

upon motion, an indictment for selling coals by false measure. *Rex v. Osborn*; Monday 23th April 1766.

MOTION DENIED.

Regula



1842

Hilary Term 6 Geo. 3. B. R.

1766.

Regula generalis.

Thursday 6  
Feb. 1766.

All enlarged  
rules to a subse-  
quent term to be  
fixed to subse-  
quent days  
therein, and co-  
pies thereof to  
be given the  
judges the day  
before the be-  
ginning of every  
term.

LORD MANSFIELD mentioned and declared that  
the court was come to a resolution—

That every rule which shall be enlarged to the next sub-  
sequent term, shall be fixed to a particular *peremptory* day,  
within the *first five* days of such subsequent term; namely,  
the first five to be appointed for the first day; the next five,  
for the second day; the next five, for the third day; the  
next five, for the fourth; the next five, for the fifth; and  
then round again, in addition to each day; and shall be  
called by the officer, after the whole bar shall have moved.

His lordship observed that this will be a very great con-  
venience to the gentlemen at the bar, especially those who  
are in great business; as they will know when to be ready  
and prepared, by being apprized of the exact time when the  
motions are to come on; and also to the attornies, who will  
then know with certainty, *when* to attend their motions, and  
not be obliged to attend from day to day at an absolute  
uncertainty when they may chance to be heard.

Whereupon, I took the liberty to mention to the court,  
how very proper and convenient this regulation would be in  
*another* respect also, *viz.* in saving expence to the suitors of  
the court: for that the bills of costs which came before me  
for taxation were at present full of numerous charges for  
attending motions for a great many days together; upon all  
which days they alledged that they had actually and neces-  
sarily attended; the truth of which assertions it was almost  
impossible for me to judge of, and consequently to know how  
many attendances it was reasonable to allow them for.

LORD MANSFIELD mentioned this to the bar, and said  
that in *this* respect also, it would be a great convenience to  
the attornies as well as the client, for that it was not worth  
their while to attend here several days at an uncertainty, for  
the common fee allowed for an attendance; and by this re-  
gulation, the particular day will be punctually ascertained.

Master Owen informed his lordship (which he also men-  
tioned to the bar) that it would be still *more* advantageous to  
the attornies on the *civil* side: as he never allowed them any  
more than *one* attendance, be their actual attendances ever so  
many.

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Lord MANSFIELD added a direction, "That after every term, there be a *list* made out, and fixed up in the offices, both on the crown and civil side, of the rules so enlarged, and the particular days when the respective motions are to come on: and that a copy of such lists be delivered to the judges respectively, the day before the beginning of every term.

1766.

MEMORANDUM—The next day (*Friday* the 7th of *February*) at the sitting of the court—

Lord MANSFIELD spoke to both the clerks of the rules, and told them that instead of going on with five causes for five days, and then round again, (which would *overload* those five first days,) it would be better, and he accordingly directed, that the method should be as follows, *viz.* "To appoint the *first five* enlarged rules (either on the criminal or civil side of the court, as they might happen,) for the *first* day of the next term; the *second five*, for the *second* day of it; the *third five* for the *third* day; and so on, *toties quoties*, to the 6th, 7th, 8th, 9th, 10th and following days of such subsequent term, WITHOUT *returning back* at all to the first day."

N. B. An attorney now present in the court, declared publickly, upon his cause being put off till tomorrow, "That he had attended it *fourteen* days, but had not been able to get it on;" some or other of the counsel concerned in it, being either absent or otherwise engaged.

This rule, and the appointment of particular days for special motions, have had a wonderful effect.

Formerly, no rule to shew cause came on, till it was moved by counsel: and no counsel might move oftner than once. Matters of the most consequence and greatest length were postponed. The leading counsel could keep back what they pleased. Business was thrown off to the end of the term; and so great a load upon the last day of it, that though the court sat till midnight or later, nothing long could be gone into, but was of course adjourned till the next term; and with a little management, (where delay was wished,) from term to term. But *now*, though the business is greatly increased, and increases daily, the whole is gone through with ease; the counsel know what to be prepared upon; the



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attornies know when to attend ; and every possibility of affected delay is cut off : no body attempts it : because they know, it would be in vain.

Hernaman *versus* Bawden et al'. Executors of Ford.

Saturday 8 Feb.  
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The wages of a sailer not payable if ship be lost or taken before the end of the voyage.

THIS was an action by a sailer for wages in a voyage " to Newfoundland ; and from thence, to Spain or Portugal, or some port in the Mediterranean."

A verdict had been given for the defendant : and the judge (Mr. Justice Gould) gave the plaintiff leave to move for a new trial, without payment of costs ; upon a question which arose at the trial.

The question was " Whether the sailors in such voyages are intitled to their wages, at Newfoundland, or not till the ship's arrival at the port of delivery of the fish."

The contract was " That the wages should be paid at that port at which such wages were USUALLY due."

The fact was " That this ship was taken, after its arrival at Placentia in Newfoundland ; and upon its voyage from Newfoundland to it's port of delivery of the fish."

It was insisted on the part of the defendant, that in the course and nature of this particular trade to Newfoundland for fish, the whole is considered as one entire voyage ; and is not understood to be finished, till the ship's arrival at the port of delivery of the fish : though they admitted that the general rule in other voyages, was, " That the wages are due upon the ship's arriving at it's first port of destination or delivery."

Contra—for the plaintiff, it was denied that this is the course or custom in those Newfoundland-voyages : UNLESS it be particularly specified in the contract : which the plaintiff's counsel said, was usually done, when this was intended by the parties.

They argued, that freight is the mother of wages ; and that the quantum of the freight is quite immaterial.

Here, no such custom as is alledged, has been proved.

Indeed, a special contract may control a general law : but this contract does not do so. Nor can the OPINION of two or three witnesses, or even of the jury, establish it as a custom. And

And it's being *usually inserted* in the contract, proves  
 "That there is *no* such general custom."

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HERNIMAN v.  
 BAWDEN et al.

LORD MANSFIELD—It depends upon a matter of *fact*, whether this case is within the general rule of law: which matter of fact is "WHERE *the first place or port of DELI-*  
 "VERY, upon this voyage or contract, is."

It is a voyage from *Barnstaple to Portugal or Spain, or other Port in the Mediterranean*, taking in a cargo of fish at *Newfoundland*. And so is the very contract itself: which describes it as *one single voyage*; which is to *end* either in *Spain or Portugal* or some port in the Mediterranean, at the election of the freighter.

And the ship was lost *before* it arrived at its port of delivery.

Therefore the verdict is right.

Mr. Justice WILMOT concurred. *Newfoundland* is NOT the *delivering* port; but the *loading* port: there the *cargo* is to be put on board; which cargo is to produce the *profit* of the voyage.

This is a contract for a voyage from *Barnstaple* to some port in *Spain or Portugal*, or some port in the *Mediterranean*, going round by *Newfoundland*.

Mr. Justice YATES concurred. 'Tis all *one entire voyage*. The *fish* is the *only lading* of the ship: no matter where taken in. And the ship was lost before it's arrival at the port of delivery. As the freighter lost his cargo, the mariner ought to lose his wages. The verdict is right.

Mr. Justice ASTON declared himself to be of the same opinion.

The *posse* was ordered to be delivered to the DEFENDANT.

Benson *versus* Sir Thomas Frederick Bart.

LORD MANSFIELD reported the evidence given upon a writ of inquiry which had been executed before him; and upon which, 150*l.* damages had been given. Court refused to quash writ of inquiry, on account of excessive damages, though the court acknowledged them to be so, from the peculiar circumstances of the case.



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SIR THOMAS  
FREDERICK.

It was an action brought against the defendant, who was colonel of the *Middlesex* militia, for ordering the plaintiff, who was a common man therein, and had a furlough from the major, to be stripped, and to receive 20 lashes from two drummers.

Mr. *Morton* had moved to set aside this verdict, for EXCESSIVENESS of damages; and had obtained a rule to shew cause.

The counsel on both sides left it upon his lordship's report.

Lord MANSFIELD said, he had no doubt but that it might be right to give an opportunity of reconsidering verdicts where excessive damages had been given.

But in the present case, he was not dissatisfied with the verdict: for Sir *Thomas* had manifestly acted arbitrarily, unjustifiably and unreasonably. He had ordered this innocent man to be flogged (though unjustly and improperly,) merely out of spite to his major; because the major (*Spinnage*) who gave the man the furlough, had offended him: in which he acted *malò animò*, and out of mere spite and revenge. And the man, though not much hurt indeed, was scandalized and disgraced by such a punishment. The defendant is a man of such substance as to be very able and sufficient to pay this sum; and could only save a part of it by having a new writ of inquiry, if we were to direct one. His lordship acknowledged that he thought the damages were very great, and beyond the proportion of what the man had suffered: and yet, under the whole circumstances of the case, he was not for granting a new trial.

Mr. Justice WILMOT concurred; and observed, that it was rather owing to the lenity of the drummers than of the colonel, that the man did not suffer more. Therefore, though he had no doubt but that the court might look upon these damages to be too high, in a common and ordinary case, and had power to set aside the verdict and award a new writ of inquiry; yet as in *this* case, the defendant had acted very arbitrarily, and was well able to pay for it, he did not think the court were obliged to set aside the verdict that the jury had found.

Mr. Justice ASTON concurred. He was very full in vindicating the discretion of the court to grant new trials, even when the damages were ideal; and cited the case of \* *Wood v. Gunston*. But as, in the present case, the defendant had acted very arbitrarily and unjustifiably, and under the

the circumstances that appeared upon the report, he did not think *this* to be a proper occasion for the court to set the verdict aside.

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*Per Cur.* unanimously,

RULE DISCHARGED.

*Hesketh versus Braddock.*

Tuesday 11  
Feb. 1766.

**T**HIS was a writ of error from the great sessions for the county of *Chester*; who had reversed the judgment of the *portmote* court of the city of *Chester*, in an action of debt brought there for recovering a penalty of five pounds, upon a by-law made by the corporation of the city of *Chester*. The breach of the by-law was assigned in the defendant's keeping an open shop, and exercising the trade of a grocer, within the said city, though he was not a freeman of the city.

By-law in restraint of trade bad, unless there be a custom to support it.

The original action was brought by *Peter Ellames* and *Henry Hesketh* the treasurers of *Chester*, in the said court holden before the mayor called the *portmote* court; and judgment was there given for the plaintiffs: after which judgment, *Peter Ellames* died.

The declaration states an ancient custom, "That no person whatsoever, not being free of the said city, might or ought to sell or put to sell any wares or merchandizes within the city or the liberties thereof by retail; or keep any open or inner or other place or room for shew sale or putting to sale of any wares or merchandizes by retail; or to use or exercise any art, occupation, mystery or handicraft within the same city; the time of the fairs excepted." Then it states a custom "That the mayor aldermen and common council might ordain fit remedy for any customs that might seem difficult or defective; or if any things newly arising, where remedy before was not ordained, should need amendment."

Then the declaration states, that at a common council holden on 26th September, 9 G. 2. before the mayor &c, duly assembled according to the aforesaid custom &c, a by-law was made, "That no person whatsoever, not being free of the said city, should, at any time after the feast of St. Michael the Archangel then next ensuing, by any way, colour or means whatsoever, either directly or indirectly, by himself or any other, shew sell or put to sale any wares or merchandizes whatsoever, by retail; or keep any shop



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“ or other place whatsoever, inward or outward, for shew  
 “ sale or putting to sale any wares or merchandizes whatso-  
 “ ever, by way of retail; or use any art, trade, occupation,  
 “ mystery or handicraft whatsoever, within the said city or  
 “ the liberties or suburbs of the same, (the time of fairs in  
 “ the said city excepted;) upon pain to forfeit the sum of  
 “ five pounds &c, to be recovered by action of debt, bill  
 “ or plaint, to be prosecuted in the name of the treasurers  
 “ of the said city, in the abovementioned court of *portmote*,  
 “ to be held before the mayor &c, &c, with costs of suit;  
 “ and that (after the costs of suit had been deducted,) one  
 “ third part of such forfeiture should be distributed among the  
 “ prisoners in the *North-Gate* gaol of the said city; and ano-  
 “ ther third part should be paid to him or them who should  
 “ first give information of such offence.”

Then the declaration assigns the breach, as is abovementioned.

The defendant pleaded “ *Nil debet* .” and issue was joined thereon; and a *venire* awarded to the SHERIFFS of the city of *Chester*.

The defendant, on the return-day of the *venire*, *challenged* the array of the pannel, because it was arrayed and made by the SHERIFFS who were *citizens and freemen* of the said city. Wherefore he prayed “ That the said pannel might be “ quashed.”

To this challenge of the array of the pannel, the plaintiffs demurred. And the defendant joined in demurrer. After which joinder in demurrer, the record immediately proceeds thus—“ And hereupon, it is judicially taken notice of, by “ the said court here [the *portmote*-court] and is known to “ the same court, that by the custom and constitution there- “ of and of the city aforesaid, *no* person or persons can or “ ought to array the pannel of any jury within the jurif- “ diction of the said court or in any civil suit within the said “ city, other than the *sheriffs* of the city for the time being, “ or one of them, or (by reason of any default in the said “ sheriffs) the *coroners* of the said city for the time being, “ or one of them; and that by the custom of the said city “ from time immemorial, *no* person or persons can or ought “ to be sheriffs or coroners of or within the said city, *but* “ citizens and freemen of the same city.”

The record then states the judgment of the *portmote*-court, “ That the said *challenge* of the defendant to the said array of “ the said pannel be *disallowed*; and that the said pannel of the “ aforesaid jury so arrayed as aforesaid, be *allowed and taken*.”

Then

Then the record goes on and states that the defendant, *ore tenus* in open court challenged the *POLLS*; because the *jurors* and each of them were *citizens and freemen*.

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This challenge was also disallowed by the *portmote-court*: and thereupon the issue was tried; and a verdict found for the plaintiff; and judgment accordingly.

A writ of error was then brought in the court of great sessions: and the judgment of the *portmote-court* was reversed there. Upon which judgment of reversal, the present writ of error was brought here,

On *Tuesday* the 28th of *January* last, this case was argued by Mr. *Davenport* for the plaintiff in error, (who was also the original plaintiff below;) and Mr. *Ashburst*, for the defendant, who was the original defendant below.)

Mr. *Ashburst* declaring that he did *not* mean to dispute the *custom*, nor the \* *by-law*, nor the *form* of the declaration; but chiefly objected to the *INTEREST* of the *sheriffs* and *jurors*.

\* It had been  
objected below,  
" That the by-  
law was a bad

" one; and that even the custom itself, upon which it was founded, was a bad custom; in as  
" much as it appeared thereby, that none could array the panel but persons who were them-  
" selves freemen."

Mr. *Davenport* applied himself to answer that objection.

It was in the *portmote-court* objected, on the part of the defendant, " That the *sheriffs* and *jurors* were *citizens and free-  
men* of the city of *Chester*."

He first cited *Co. Litt.* 156, 157. And then endeavoured to shew that the *sheriffs* were either not interested at all; or if at all, at least in so small and trifling a degree, that it could be no objection to their returning the *venire*: and that the interest of the *jurors* was likewise either none at all, or not sufficient to ground the least suspicion of bias upon. Indeed, the objection does not lie at all against such of the *freemen* as are not traders.

One third part of this penalty is to be given to the prisoner; one third to the informer; and one third is unappropriated: the *freemen* have no benefit in it, *as such*. If they had, it would not be a sufficient objection: as appears by 2 *Lev.* 231. *Rex v. Mayor, Citizens &c. of London*.



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*Admitting* "That there may be a *small remote interest*"—the case of *Ball and Bostock* in 1 *Strange* 575, shews that a person, though in some degree interested, may yet be a witness.

In the course of his argument, he endeavoured to shew that the by-law was a good one; and cited *Cartbew* 480. *The City of London v. Vanácker*. 1 *Ld. Raym.* 496. S. C. (with respect to the City of London finding those who are elected and refuse to serve the office of sheriff.) 1 *Lev.* 14. *Mayor and Commonalty of London v. Bernardiston*. 2 *Kemble* 295. *Mayor and Commonalty of London v. Gould*. 12 *Mod.* 669. *The City of London v. Wood*. 1 *Salk.* 397. S. C. 8 *Rep.* 121. *Waggoner's Case*. 2 *Brownl.* 289. S. C. *Waggoner v. Fish*. *Wakeman v. Harris*, B. R. Trin. 1753. 26, 27 Geo. 2. in *Worcester*. *Bodwick v. Fennell*, M. 1748. 22 G. 2. B. R. on a like by-law as the present; at the *Devizes*. *Errington v. Geekie*, *Pasch.* 9 G. 2. B. R. there cited.

The same objection must lie against a judge, as against a jury: because one is to judge of the law; the other, of a fact.

Here, the mayor, sheriffs, coroners, and jury were all of them citizens and freemen.

No part of the *penalty* appears, upon the face of the record, to belong to the city: nor is it necessary that every freeman should be considered as interested.

He therefore prayed that the judgment of the great sessions of *Chester* should be reversed.

Mr. *Ashburst*, *contra*, for the defendant.

The *sheriff*, at the time of arraying the pannel, was a citizen of *Chester*; and appears upon the face of the record to be so: and this is a good cause of challenge. *Co. Litt.* 157. 12 *Mod.* 687.

The interest of the sheriff is either *direct*, or at least so *consequential* as to affect him.

The *penalty* is divided one third to the prisoners, one third to the informer; and one third remains *undisposed of*, and therefore belongs to the plaintiff (the treasurer) for the *benefit* of the corporation. (For which, he cited a case in *H. 3 G. 1. B. R. Hollings v. Hungerford*.) And the sheriff is *confessed*,

*feffed*, by the demurrer to the challenge, to be a citizen; and, *as such*, to be intitled to a part of it.

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He cited the case of *Anstey v. Dowling*, 2 Str. 1253, in answer to the *minuteness* of the interest not making any difference. Any degree of interest is an objection. So it is to witnesses with regard to the *repair of county bridges*. So it is to corporators: 1 Vern. 254, *Corporation of Sutton Coldfield v. Wilson*. So it is to parishioners: 2 Vern. 317. *Dodswell v. Nott*—; where the suit related to the loss of money given for the benefit of the parishioners; and the question was “Whether any inhabitant of the parish ought to be admitted as a witness;” and it was insisted “That the interest was so minute and inconsiderable, that it could not be presumed to influence or bias the witness in his evidence.” But the court, in that case, said “The cases, where the party was concerned in interest, though never so small, have always prevailed: and it was so resolved, upon great debate, in the case of the city of London concerning the water-bailiff.”

Therefore the *minuteness* of the interest is out of the case.

But if the sheriff's interest is not direct, it is at least *consequential*, and a principal cause of challenge.

The case of *witnesses* is applicable to the present question. They are not admissible, if interested; as, for instance,

A *commoner*—to a right of common;

A *parishioner*—to a modus;

A pilot—about steering a ship, 1 Salk. 287. *Martyn v. Kendrickson*—in which last case, Holt, C. J. would not suffer the pilot to be a witness: because he was answerable, if faulty in steering, to the master. Indeed, the objection lies stronger to a jury-man than it does to a witness—there is a check on the one: none on the other.

This being a plea of *nil debet*, it was necessary to prove the whole declaration; and, consequently, to prove the custom, and also the *by-law*: and therefore the jury ought not to have been returned by *citizens and freemen*, who must have a bias in it's favour.

As



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As to the reason given in the record, why the court below did not allow the challenge—it is an arbitrary reason: it should have come by way of *counterplea*.

Besides, such a *custom* as is there alledged, “That none but sheriffs and coroners can array the pannel,” is a *bad custom*.

This by-law does not nor could exclude *this* court from trying this cause; nor could hinder it from being tried elsewhere than in the *portmote-court*. Therefore if the sheriffs and coroners could not return a jury, the plaintiffs MIGHT have tried the cause ELSEWHERE.

He then answered the cases cited on the other side.

The cases in 1 *Ld. Raym.* 496, *Carthew* 480, and 1 *Lev.* 14, were upon returns to writs of *habeas corpus*: this is by way of *challenge*. 2 *Keb.* 295, is as much for me, as for Mr. *Davenport*. 2 *Lev.* 231, does not hold so strong, as in the case of a sheriff.

In the case of *Bodwick v. Fennell*, there was no challenge: and the whole penalty was given to the informer, in that case.

As to *Wakeman v. Harris*—No proper bill of exceptions was tendered or signed: therefore they could not take advantage of the exceptions there.

Therefore he prayed that the judgment might be affirmed.

Mr. *Davenport*, in reply—It is not necessary for the court to infer here, that the treasurers are trustees for the corporation. No such thing appears upon the record.

As to *Hollings v. Hungerford*—The chamberlain was a stranger to the corporation. But if not, yet this has never been objected to the mayors of London bringing these actions.

As to commoners, parishioners, pilots, &c.—There the interest is considerable: here, it is nothing, or next to nothing.

This custom does NOT depend upon the success of this action.

They can make no effectual by-law, if they can not support this by-law.

All

All courts must *take notice* of their own customs: and their customs can be tried no where else.

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But Mr. *Ashurst* says "That if it can not be tried else-where, it is a bad by-law."

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Answer—The by-law is a *good* by-law: it is *admitted* to be so; and the case of *Bodwick v. Fennel* proves it.

Returns to writs of *habeas corpus* are as much in point, as other cases. And in the present case, there was a *procedendo* granted by the chancery-court of exchequer at *Chester*:\* therefore those cases of *procedendos* are in point.

\* This appears upon the record.

LORD MANSFIELD—We will look into the cases: and if we have any doubt, we will let you know; that it may be argued again. If we have no doubt, we will let you know our opinion.

I think this is the first case where the objection has been taken upon the record.

*Cur. advis.* or *ulterius concilium*;  
(eventually, as the court should direct.)

On *Friday* the 7th of *February* it was ordered to stand for judgment on *Tuesday* the 11th,

And now—

LORD MANSFIELD delivered the resolution of the court; to the following effect.

This was an action of debt for the penalty of a by-law, which the defendant was supposed to have incurred by keeping a shop within the city of *Chester*, not being a free-man.

The action was brought in the *portmote*-court, which is holden before the mayor; and was prosecuted by the plaintiffs, as treasurers of the city, (who are similar to chamberlains in other corporations.)

The declaration states a *custom* in the city of *Chester*, "That no person who is *not a freeman* could keep any shop, or expose goods to sale by retail, within the said city; excepting at fairs." And then the by-law is set forth: which ordains



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ordains "That *no person who is not free of the city, should sell goods by retail, or keep any shop for a retail sale, within the said city, excepting at fairs; upon pain of forfeiting 5l. for every offence.*" This penalty is directed by the by-law to be recovered by action of debt, to be prosecuted in the name of the *treasurers of the city*, in the *portmote-court* to be holden before the *mayor*: and *one third of the penalties* (deducting the costs) is allotted to the poor prisoners in the *North-Gate* gaol of that city; another third, to the person who should first give information of the offence; and the remaining third is left *undisposed of*. The declaration then charges, that the defendant had kept an open shop in the city, not being free; in violation of the custom and by-law aforesaid: and therefore the plaintiffs, being treasurers of the city, demand this penalty.

To this declaration the defendant pleaded "*nil debet*:" and issue being joined thereupon, a *venire* was awarded to the *sheriffs of the city*, to return a jury of twelve free and lawful men of the city.

When the jury were returned, the defendant *challenged the array*; because the *sheriffs were citizens and freemen*.

The plaintiffs demurred to the challenge: and the defendant joined in demurrer.

In this part of the record, an extraordinary entry is introduced, as a suggestion of the court, that it was *judicially taken notice of*, "That, *by the custom of the city, no person could array any jury, within the jurisdiction of that court, but the sheriffs or coroner of the city, or one of them:*" and "That *none could be sheriffs or coroners, but citizens and freemen.*"

After this suggestion, the court gave judgment on the challenge, "That the same should be *over-ruled*, and the *array allowed*."

The defendant then challenged the *polls* of the jury; because they were, all of them, *freemen*.

And *this challenge was also disallowed*.

And thereupon, the jury (thus returned and objected to) proceeded to try the issue: and a verdict and judgment were given for the plaintiffs.

Upon this judgment, the defendant brought a writ of error in the court of pleas for the county palatine: and there the judgment of the *portmote*-court was reversed.

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And upon this judgment of reversal, the present writ of error was brought in *this* court.

THE ERRORS for which the judgment was reversed in the county-palatine court, were—

1st. Because the *two sheriffs* who returned the jury, and the *jurors themselves* were *freemen* of the city, and (as such) were *interested* in the matters to be tried; and therefore that the *challenges* were *erroneously over-ruled*: 2dly. That, as it appears from the suggestion introduced into the record, “That in the *portmote-court*, no jury could be returned, but “by sheriffs or coroners, who are *freemen of the city*; the by-law which confines the action to such a jurisdiction (where the sheriffs and jury must necessarily be interested) is, in that respect, a bad and illegal by-law.”

In answer to these objections, it was argued for the plaintiffs, “That neither the *sheriffs* nor the *jurors* were interested at all, in the present suit.” The plaintiffs arguments.

It was admitted, “That where a corporation are parties to the suit, or immediately interested in the very issue in question, no freeman can be either a juror or a witness.” *Co. Litt.* 157. 3 *Keble* 12, 295. But it was said, that, in this case, the corporation are no parties to the action, nor any way concerned in the point in issue. That the suit is by the treasurers in their separate capacity; and, whatever be the event of it, the corporation can neither pay nor recover any costs. That in this action, the object of litigation is merely the penalty of the by-law; and in that penalty, the corporation have no share or interest.

It was further argued, that though the by-law is founded on a custom “To exclude all foreigners from the city;” and the freemen may be said to have an interest in that exclusion; yet this is a remote consideration, which, at most, can affect only such of the freemen, as happen to be traders. That the circumstance of a freeman’s being a trader, is a particular uncertain incident; which, if it happens to occur in any of the jurors, might indeed warrant a challenge for favour (where the



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the fact would be tried :) but that a *mere possibility* of such an interest is no sufficient ground for a *principal* challenge.

It was also observed, that the verdict for this penalty would not avail the corporation, in any suit upon the *custom*. For, if the custom were to be litigated in a superior court, the corporation could not give this verdict in evidence.

And as to the *suggestion*—It was insisted, that *every court* must *judicially* take notice of their own customs : and, as none but freemen could possibly be either sheriffs or jurors, if the present objection should prevail, this by-law would be left without a remedy to enforce it; and consequently there would be a failure of justice.

THIS is the substance of the arguments which were offered in support of the judgment of the *portmote-court*.

But we are all very clearly of opinion, that in *this case* *neither* the *sheriffs* nor *jury* were competent; and therefore the challenge was IMPROPERLY over-ruled at the *portmote-court*.

There is no principle in the law more settled than this—That *any* degree, even the *smallest* degree of interest in the question depending is a decisive objection to a witness, and much more to a *juror*, or to the *officer* by whom the jury is returned.

The law has so watchful an eye to the pure and unbiassed administration of justice, that it will never trust the *passions* of mankind in the decision of any matter of right. If, therefore, the *sheriff*, a *juror*, or a *witness* be in *any sort* interested in the matter to be tried, the law considers him as under an influence which may warp his integrity, or pervert his judgment; and therefore will not trust him.

The *minuteness* of the interest won't relax the objection. For, the *degrees* of influence can't be measured : no line can be drawn, but that of a total exclusion of *all* degrees whatsoever.

In the present case, *every* member of the corporation was evidently interested in the very issue to be tried. For, the custom "To exclude all strangers from trading in the city," is the main foundation of the action : it is the only ground upon which such a by-law could, in any case, be valid. For, a by-law "To exclude," *without* a custom to support it, would be void, as an illegal restraint upon the common right of the subject.

It

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It was therefore necessary for the plaintiffs to alledge this custom in their declaration. And the defendant's plea of "*Nil debet*" puts the *whole* declaration in issue. Upon that issue, the plaintiffs must *prove* the *custom* "*To exclude*," as well as the *by-law*: and the jury must form their verdict upon the *whole*. For, *all* the facts alledged must *concur*, to prove the defendant indebted to the plaintiffs. If there was *no* such custom, the *by-law* was a *nullity*; and consequently, the defendant could not owe the penalty.

So that here *every* freeman was interested in the very issue to be tried. They may indeed, have no share in the penalty itself: but they are interested in the facts on *which* the penalty depends.

The exclusion of foreigners is a *MONOPOLY* to the *freemen themselves*. The enforcing of this exclusion, by by-laws and penalties, is securing that monopoly. And in this action, the very freemen who were to gain by securing this monopoly, were the jury to determine it. Therefore *every* freeman had an interest and bias in the matter of the issue to be tried in this cause.

It is no answer to the objection, to say "That they were to have no part of the *penalty*:" for still they had a *bias* upon them in relation to the question to be tried. Whatever the action may be, if a juror be interested in *any* of the matters in issue, he is unfit to try them. The incapacity arises from his bias in the particular facts he is to try: and *whatever* be the facts which that bias touches, he is incapable of trying *those* facts.

In the case of *Day v. Savadge*, in *Hobart* 87. The suit was an action of trespass between two private persons. But an issue being taken upon a custom in *London* "For every freeman to be discharged of wharfage," the court would not suffer this custom to be proved by the recorder: and on that occasion they held that "Where the issue *concerns* a corporation, though they be not directly *parties* to the suit, if they are to make the pannel, or any of their body are to go upon the jury, it is a cause of challenge."

None of the cases which Mr. *Davenport* has cited on the part of the plaintiff, come up to the present case. *Vanacker's* case was on a by-law that affected their own members only; and where the parties on both sides were equally freemen.

In



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In the case of *Bodwick v. Fennell*, it was stated at the bar, "That no exception or challenge was taken." And as a party may waive all exceptions, if he pleases; if he does not object, it is a virtual acquiescence.

In *Wakeman v. Harris*, there was also no challenge; and the bill of exceptions was *not sealed*: and therefore the court could not take any notice of it.

*The Case of the City of London v. Wood* was cited on both sides. Mr. *Davenport* relied on the words of Lord Chief Baron *Ward*, that the objection to the mayor's sitting as judge in a cause of the corporation was not so much in point of *interest*, as inconsistency. But is not the *interest* a great *ingredient* in that inconsistency? And hence comes the rule "That no man shall be judge in his own cause." And the same rule will equally apply to a *juror*.

It was said, "That if the defendant's challenges be allowed, the corporation will be left without remedy on the by-law."

The answer is, That if the fact be true "That they can impanel no jury but freemen," the fault was their own, in confining the action to their own court. On the other hand, if they had a power (as the city is a *county* of itself,) to have impanelled *non-freemen*, it was their own fault that they did not.

In the regulation of their own members, they may indeed make by-laws, and enforce the observance of them by prosecutions amongst themselves; because every member of the corporation is bound by the jurisdiction into which he voluntarily enters; and being all of them freemen, their circumstances are equal. But if corporations were to try their *own* suits *against strangers*, upon a by-law "For excluding all *traders but themselves*," there would be an end of the distinction which has long been established, "That a by-law which lays this restraint upon trade is void, *unless* there be a *custom* to support it."

If the custom be a *necessary foundation* for supporting such a by-law, it is necessary to *prove* it. But if the freemen themselves might determine upon it, they would not be very exact in that proof: and by-laws themselves, *without* any such custom, would soon have an equal effect.

Had this by-law been *general*, without *limiting the action* to the treasurers, or to their own court, they might then have tried

tried it in a *superior* court; and the whole would have come to a proper decision.

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Therefore we are all of opinion "That the judgment of the court of great sessions, reversing the judgment of the portmote-court, ought to be affirmed."

JUDGMENT of the *Great Sessions* AFFIRMED.

## Rex *versus* Inhabitants of Dunchurch.

See this *Case* ABRIDGED, in the TABLE; and *at large*, in the (1 Black. Rep. Quarto-edition of my SETTLEMENT-CASES, No. 177. 596. S. Et) P. 553.

## Sir George Colebrooke, Bart. *versus* Elliott.

THIS was an action of debt brought by the lord of the manor of *Stepney*, for an *amercement* set and assented in the court-leet of that manor. *Nil debet* was pleaded; issue was taken thereon; the cause tried before Lord *Mansfield*; and a verdict found for the plaintiff.

Offence of selling a loaf of bread short of weight, is not within the jurisdiction of court leets.

On Monday the 27th of January 1766, Mr. *Bainham* moved on behalf of the defendant, for a new trial; reserving a claim to a future motion in arrest of judgment: and he now proposed no less than seven objections. But the discussion of them was adjourned to the following Wednesday.

On which Wednesday (the 27th of January 1766) he was supported in his motion, by Mr. Serjeant *Burland*: and they obtained a

Rule to shew cause "Why the verdict should not be set aside, and a new trial had"; with liberty to move afterwards, in arrest of judgment.

On Saturday the 8th of February 1766, Lord *Mansfield* reported the evidence given at the trial: and

Sir *Fletcher Norton*, Mr. *Morton*, and Mr. *Dunning* shewed cause why there should not be a new one.



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They were answered by Serjeant *Burland*, Mr. *Stowe*, and Mr. *Bainham*.

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Lord MANSFIELD said it would be proper to look into it: And it stood upon a

*Curia advisare vult.*

On Wednesday the 12th of February 1766,

Lord MANSFIELD delivered the resolution of the court, which was to the following effect.

This is an action of debt for amercements set and affected in the court-leet belonging to the manor of *Stepney*.

The fact charged in the declaration and presentment (which is set forth in the declaration) is the defendant's having in his custody, and exposing to sale, a loaf of bread pretended to be and as and for a quatern loaf of the weight of 4 lb. 5½ oz.; whereas it wanted 4 oz. and ½. "*Nil debet*" was pleaded; and issue joined: the cause was tried; and a verdict given for the plaintiff.

Upon the trial it was objected, "That the presentment given in evidence was neither sealed nor indented, as it ought to have been by the statutes of *Westm. 2. c. 13.*" and 1 *Edw. 3. stat. 2. c. 17.*"

Leave was then given to the defendant, to move for a new trial, without payment of costs.

Afterwards, another objection was taken here at the bar, "That the court-leet had no jurisdiction."

Some other objections were also taken; which have been since dropped.

In our opinion, it is not necessary that a presentment of this kind should be either sealed or indented.

The *turn*, and the *leet* (derived out of it) were anciently the principal courts of criminal jurisdiction; coeval with the establishment of the Saxons here. There were no traces of them, either amongst the Romans or Britons: but the activity of those courts is marked very visibly both amongst the Saxons and the Danes.

By

By *Magna Charta*, cap. 17. their jurisdiction is abridged, their power "To hear and determine" is taken away; but not their power "To take indictments, and apprehend the parties indicted."

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That power was abused. They took people up, to extort money from them, upon pretence of their having been indicted in their turns *de furtis et aliis malefactis*, when in fact they had not been lawfully indicted. The statute of *Westm.* 2. c. 13. recites that grievance; and directs that sheriffs in their turns shall enquire by twelve lawful men, at the least, *de hujusmodi malefactoribus; qui hujusmodi inquisitionibus sigilla sua apponant; et sicut dictum est de vicecomitibus, observetur de quolibet ballivo libertatis.* And 2 *Inst.* 388. says "This act extends to leets": and it certainly does. But it respects only such inquisitions, as are a foundation for imprisonment. That was the grievance intended to be obviated—to prevent fictitious imprisonment, upon pretence of inquisitions *de furtis et aliis malefactis*. The act does not relate to inquisitions for offences where the party can't be apprehended, but the proceeding against him is only by amercement; where the delinquent can either be taken up in the first instance, or even punished for the offence by imprisonment.

The universal PRACTICE is NOT to seal these inquisitions.

And as to the indenting—It is not necessary that such an inquisition should be indented. The act of 1 *Edw.* 3. extends to courts leet: but the reason of the law fixes the true construction of it. It was made, to prevent the altering or embezzling such indictments as were to be delivered over to the justices: it don't relate, therefore, to presentments, which were to be proceeded upon in the turn or leet, and not to be delivered over to the justices. • Stat. 21 cap. 17.

But it was not necessary to have determined these points; because we are ALL of opinion "That the OFFENCE presented is not within the JURISDICTION of the court LEET; because it is a new offence, created by act of parliament, and can be prosecuted only in the manner directed by the act."

THE ASSIZE OF BREAD is an ordinance ascertaining the weight, and the price of it, which is to be regulated by the price of corn. The intention was, to preserve a due proportion between them; making the baker a reasonable allowance: (a very wise provision, to derive the effects of plenty upon the poor.)



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If that assize was *broken*, (whether *set* by the court leet, or not,) the *breach* of it was always *presentable* and *punishable* in the court leet. But the assize must *fix* both *price* and *weight*: and it would be very incomplete and imperfect, if it were to *fix only the weight*, and leave the *price* with a *seller*.

The 51 H. 3. (*assisa panis et cervisia*) fixes *both*: and the variations in that assize, occasioned by the different prices of corn, always took in *both*.

The 8 Ann. c. 18. repeals the 51 H. 3. but directs how the assize shall be set; and exhibits a plan for that purpose. But it takes in *both the price and weight*, according to the true principle of the law.

The 31 G. 2. c. 29. repeals *all* former laws; but still proceeds upon the same principle of fixing both the *price* and *weight*: and the plan of an assize exhibited in it, shews that both are fixed by it. This act saves the jurisdiction of courts leet: and therefore, whenever and wherever an assize is *made according to the directions* of 31 G. 2. (c. 29.) the court leet may inquire and punish for the breach of it.

But the 3 G. 3. c. 11. upon which this presentment is grafted, *does not fix the price*; but was made, to meet with some inconveniences in cases where *no assize was set*; whereas the *setting the assize* is the *basis of the jurisdiction of the court leet*. If we should support this presentment, it would be giving them a jurisdiction where *no assize is set*; though their jurisdiction arises only and can only attach, where it is set.

The offence, cognizable there, is *FRACTIO ASSIZÆ*.

The counsel for the plaintiff were aware of the objection; and therefore insisted "That this act of 3 G. 3. is an assize; because it fixes the *weight*."

But it *wants* one of the essential characteristics of an assize, *PRICE*; price regulated by the price of corn in the market. And it would be a strange construction of this act, to give it the effect and operation of an assize, when it was intended only to supply the *defect* of an assize, and to operate *where and because* there was none.

The

The act directs, \* that a quartern loaf shall be four pounds five ounces and an half; under the penalty of not more than five shillings nor less than one shilling for every ounce of every loaf which shall be deficient; and not more than two shillings and sixpence nor less than sixpence for any defect under an ounce, but, in cities, towns corporate, &c., or within the weekly bills of mortality, the complaint must be made, and the bread weighed, within 24 hours; and in other places, within three days: and a summary jurisdiction is given to justices, to convict and levy the penalty.

It is unnecessary to speculate upon the *utility* of the regulation. So far it goes, that when a person buys a quartern loaf, it must weigh 4 lb. 5 oz. and  $\frac{1}{2}$ : but, as it does not fix the *price* of that quartern loaf, it reaches *only one half* of the evil.

But whatever benefit may arise from this provision, it is *not* a provision made by the *common law*; but *introduced by this statute*: and the presentment describes the offence in the *very words of the statute*; and was plainly meant to enforce the execution of the statute, and to apply the right of punishing for the breach of the assize, to the punishment of a violation of an act of parliament.

The bread must be weighed in 24 hours, or *three days*; whereas, this presentment may punish at *three months* distance. The act says, "He shall be *summoned*, † and have † V. sect. 14. "an opportunity of making his defence." The presentment can not be controverted in the court leet; but accuses and punishes, at the *same* instant.

There is a *saving* of the jurisdiction of the *leet*, in the 31 G. 2. † because that act keeps an assize in its view, from one end to the other; and the settling that assize is the great object of it. But in *this* act there is *no* such exception; because it was providing for cases where the court leet had *no jurisdiction*. † Sect. 43.

These courts were very properly adapted to the customs, manners, genius and policy of a people upon their first settlement: but, like all other human jurisdictions, vary in the course and progress of time, as the government and manners of a people take a different turn, and fall under different circumstances.

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Colman

Elliott.

V. sect. 6.



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From *Magna Charta* to this time, they have been always gradually *abridged*; never *enlarged*. Experience shews the wisdom of widening (instead of contracting) the circle of both civil and criminal jurisdiction.

But the point is not, now, upon *abridging* the jurisdiction of the leet: the present question is, "Whether we shall *increase* it, and give them power to hold plea of an offence against an act of parliament, which is formed upon a plan that has been uniformly and universally pursued from the Conquest to this day."

Upon the *first* and other objections (which were waved) I gave leave to move for a new trial, *without costs*. The *second* objection was not then made. As it *now* comes out, the defendant should have had a verdict; which would have *carried costs*.

The plaintiff could not have maintained his action of debt for this amercement; because, it appears upon the whole of the case, that there is *no debt due* to him. The plea of *nil debet* puts the *whole* matter in issue; and upon the *whole* matter, nothing is due to the plaintiff.

But the defendant can't have any *costs*, under the *present* form of proceeding. Here is *no demurrer*; but a *verdict against him*: nor did he insist at the trial upon a *case* to be stated for the opinion of the court. So that there can be no possibility of entering a verdict *for him*, nor can the court give judgment *for him*. All we can do, is to set aside the verdict *against him*, and grant him a new trial.

Therefore— Let this verdict be set aside, and a new trial had, *WITHOUT costs*.

HIS LORDSHIP then addressing himself to the defendant's counsel, said—In the shape it *now* stands, you can't have *costs*. You may take it *either* of these two ways; *either* as I have just now pronounced the rule, *or* by having judgment arrested: but you *can't have costs*. The truth of the matter is, the defendant suffers by a *slip*; by not seeing the objection sooner. If he had seen it sooner, he might have demurred, instead of pleading "*nil debet*": and then he would have been intitled to his costs. But this he has *not* done.

It was very properly laboured by the counsel for the plaintiff, as upon an assize set by 3 G. 3: for it is certainly necessary

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effary "That an *affize* should be set, in order to support this  
"action."

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THE COUNSEL for the defendant chose to take the rule as it  
was before pronounced; viz.

That the verdict be set aside,

And that there be a new trial;

But *without* payment of costs.

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**Rex *versus* Inhabitants of Staunton under  
Bardon.**

See this *Case* ABRIDGED, in the TABLE; and *at large*, in the  
Quarto-Edition of my SETTLEMENT-CASES, No. 178.  
Page 558.

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**The End of Hilary Term 1766. 6 G. 3.**



## Easter Term

6 Geo. 3. B. R. 1766.

(1 Black. Rep.  
591. S. C.)

Friday, 18  
April 1766,

Mayer and Commonalty of Colchester *versus*  
Seaber, Executor of William Seaber his late  
Father.

Corporation  
being disabled  
to act, accept-  
ing a new char-  
ter is not dis-  
solved but dor-  
mant, and after  
such acceptance  
the new corpora-  
tion is the  
same as the old  
was.

**T**HIS was an action of debt brought upon a bond in the penalty of fifty pounds, dated 28th September 1735, conditioned for one *John Bennall's* repayment of 25*l.* then advanced to the said *John Bennall*, by the corporation of *Colchester* (according to the intent of Sir *Thomas White*, Knt. deceased, and of certain articles &c.) at the expiration of ten years : for the payment whereof, *William Seaber*, the defendant's father, was one of this *John Bennall's* sureties.

The defendant pleaded "*Non est factum testatoris*:" and thereupon issue was joined.

The cause was tried before Lord *Mansfield* at *Westminster*, at the sittings after last *Michaelmas* term, when a verdict was agreed to be given for the plaintiffs, subject to the opinion of this court upon the following facts, admitted by the counsel on both sides, *viz.*

That *Colchester* is a borough by prescription,

That by letters patent dated 6th December 1 Ric. 1. Power was given to the burgesses to appoint, from amongst themselves, their own bailiffs and justices : and by letters patent dated 1st March 1 Ed. 4, they (the bailiffs and burgesses) were incorporated, and made to consist of two bailiffs and one commonalty, in perpetual succession,

That

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SEABER,

That in 15 G. 2, by letters patent dated 3d *August* in that year, the free burgesses were made one body corporate and politic, by the name of "Mayor and Commonalty of the Burrough," to consist of one mayor, (to be chosen annually from amongst the aldermen,) 11 aldermen, 18 assistants, and 18 common council: and that this charter was confirmed by letters patent dated 27th *July* 5 *W. & M.* to the mayor and commonalty and their successors.

That on 28th *September* 1735, *William Seaber*, the defendant's testator, duly executed the bond to the said mayor and commonalty, upon which the present action is brought,

That in 1740, there were judgments of ouster against all the persons then claiming in fact to be mayor and aldermen of the said corporation.

That the said persons were all dead before the year 1763.

That from the year 1740 to 1763, no person, in fact, took upon himself or claimed to be a mayor or alderman of the said corporation.

That in 1763, the \* *present* charter was granted and accepted; and has been acted under, ever since.

\* 'Tis dated  
9 September  
3 Geo. 3.

The question was—"Whether the *present* corporation "could maintain this action."

*Sir Fletcher Norton* argued for the plaintiffs.

This depends upon the question "Whether the *old* corporation was *dissolved* in 1763;" (though perhaps the action may be maintained under the *new* charter.)

An old corporation can be *dissolved* but by three ways; 1st. by *abuser* or *misuser*; and thereby a *forfeiture*. 4 *Mod.* 52, *Sir James Smith's* case 2 *Inst.* 222; 2dly. By *surrender*, accepted on *record*; 3dly. By the *real death* of all the natural members. 1 *Ro. Abr.* 514, title *Corporations*, letter I.

Now *this* corporation was not dissolved (in 1763) by any of these three ways.

1st. Not by *forfeiture*. The *usurpation* of individuals can't dissolve the body,

2dly.



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2dly. Not by surrender. The only colour of pretence for that, is a recital in the charter of 3 Geo. 3. "That it has been represented to the crown, that the said corporation is now dissolved, or at least incapable of enjoying and exercising their said liberties and franchises."

3dly. Not by the natural death of *all* the members: for the special case only finds "That the ousted mayor and aldermen were dead." But the *rest* of the corporation (the burgesses &c) were *not* dead in 1763.

Then, though this new charter gives a mayor, aldermen, assistants, and common council, to the two former integral parts, the mayor and commonalty; yet it is no more than the charter of 15 C. 2, had done: for that charter gave those very two new integral parts, to the then burgesses. And this new charter shall not take away the rights of the old corporation. All the court held the old power to remain in *Rayn.* 439, *Haddock's case*—"For the charter does not merge or extinguish any of the ancient privileges; but the corporation may use them as before.\* If it should be otherwise, it would be very mischievous to most of the corporations in England, who have taken new charters, but were ancient corporations before." And in the case in 3 Lev. 238, of the *Mayor, Aldermen and Burgesses of Scarborough* versus *Butler*, which was an action brought by the corporation by this their new name, for a debt which had originally become due to the old corporation by the name of bailiff &c; and judgment was given for the plaintiffs: and at the end of the case, it is said that "No doubt was made of the debt due to the first corporation remaining due to the new, after the names changed by the letters patent."

\* V. i Ventr.  
355. S. C.  
accord.

Consequently, this bond is good; and the action upon it, maintainable.

BUT even *supposing* the corporation to have been dissolved—lands would indeed revert to the grantor: (1 Ro. Abr. 816, title *escheat*, letter A. pl. 2, 3.) But goods and chattels would go to the crown. And the crown have granted them, by the new charter, in as full and ample a manner as words can express.

Mr. Dunning, *contra*, for the defendant.

This is a new corporation totally *distinct* from the old one.

This

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This bond is a *chose in action*: and therefore, though I were to admit that it was granted to them by the crown by the new charter, as a chattel devolved upon it by a former dissolution, yet the *new* corporation could not bring the action in their *own* names. But they have not recited any such grant. They have declared upon this bond, as a bond given to the *present* plaintiffs.

The question is, Whether the corporation *to whom* this bond was given does still *exist*.

I do not say that the corporation was dissolved by either forfeiture or the natural death of all the members; nor do I say that the acceptance of a new charter amounts to a surrender of former rights compatible with the new grant.

But I say that it was dissolved by being rendered incapable of exercising any of its functions.

The facts stated in the case shew that the bond was given to a corporation *consisting* of a *mayor*, *aldermen* and *commonalty*.\* Now *one* (at least) of these integral vital parts being *extinct*, the body is *dead*. And this corporation could not, by any power of its own, be re-animated.

\* The words of the bond are—  
“bound unto  
“the mayor  
“and common-  
“alty of the  
“burrough of  
“Colchester in  
“the county of  
“Essex.”

The mayor is to be chosen out of the aldermen: and as there remained neither mayor nor aldermen, two integral parts were *irrecoverably gone*; and the remaining common burgesses (if any such did in fact remain) could not create either an alderman or a mayor, under their *former* constitution.

This therefore is, in point of *law*, a DISSOLUTION; and as much so as if *all* the corporators were actually dead.

And this was the state of the corporation for above 20 years. Whereupon the crown, in 1763, *created* a *new* corporation.

And the crown could grant no more rights than they had.

Sir *Fletcher Norton*, in reply—

This is not a case of the *death* of *every* natural member: *many* of them are still living. The old *root* therefore remains. And I say, the corporation is *not dissolved*; though some of the *limbs* are irrecoverably lopt off: and I say too, that the mayor and aldermen are *not vital parts*, but only like *limbs* to the natural body.

If



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If it were so, "That the loss of a limb would be fatal to the corporate body," every corporation which, before 11 G. 1, had slipped the annual election of a mayor, would have become irrecoverably dead and dissolved.

These limbs are not *vital* parts, as to *this* matter. The other members remain intitled to their *estates and rights*; and they still proceeded to elect members to parliament. The *constitution* was left: *that* was not dissolved. And the new charter put it into *action* again.

\* The new charter incorporates, the free burgesses by the name of

The *new* and the *old* corporation have the *same name*: therefore this makes no difference in the action, nor in the declaration. They have declared rightly and properly; and could not have declared otherwise.

"The Mayor and Commonalty of the Burrough of Colchester in the County of Essex."

Lord MANSFIELD—Many corporations, for want of legal magistrates, have lost their activity, and obtained new charters, *Maidstone, Radnor, Carmarthen*, and many more are in the same case with *Colchester*. And yet it has never been disputed, but that the new charters revive and give activity to the old corporation; except, perhaps, in that case in *Levinz*, where the corporation had a *new name*; and even there, the *court* made no doubt.† Where the question has arisen upon any remarkable metamorphosis, it has always been determined "That they remain the same, as to *debts* and *rights*."

† V. ante, pa. 1868.

It now comes on, as a question, "Whether the old corporation exists, after this judgment of ouster against the mayor and all the aldermen, and the new charter." And it is argued, "That this new corporation is totally *distinct* from the old one."

But there is no authority, no *dictum* for it: and the consequences are obvious, and would be most inconvenient.

Without an *express* authority, so strong as not to be gotten over, we ought not to determine a case so much *against reason*, as that the parliament should be obliged to interfere to set it right.

The corporation is *not dissolved* by the judgments of ouster and subsequent deaths of the mayor and aldermen; though they are without their magistracy: their *constitution* is not destroyed and gone. Their former *rights* remain. Would not

a freeman

a freeman of *Colchester* still continue to have a right to *common*? or to vote for members to *parliament*?

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So it stands upon *general reason*. And Sir James Smith's case in 1 *Show.* 274. and in 4 *Mod.* 52. is in point, "That the corporation is not dissolved by the judgment." Notwithstanding this judgment of ouster, a *right* may remain, so as to be capable of being again *raised* and *revived*. The corporation can not *act* without legal magistrates: but their *rights* may be *revived*, and put in *action* again, by a new charter from the crown, giving them legal magistrates.

I am clear, upon principles of law, that the old corporation was *not* absolutely dissolved and annihilated, though they had lost their magistrates; and that by virtue of the new charter, they are so revived as to be *entitled to the credits*, and *liable to the debts* of the old corporation.

Where there is a judgment against the *corporation itself*, the case would be of a different consideration.

Mr. Justice WILMOT concurred—Wherever a corporation accepts a new charter, it *remains*, to every intent and purpose, as it did before, *though* the name be altered. *Haddock's* case in Sir T. Raym. 439, is in point, on this head.

The case of the corporation of *Scarborough* in 3 *Levinz.* 238, is also very strong, upon a new charter. There the action was brought by the corporation by the *new* name: and the book says "there was no doubt made of it."

Then, the law being clear, "That a new charter does *not* destroy the right of the old corporation," the question is "whether this corporation was dissolved by the judgment of ouster against *individuals*."

Clearly, it is *not*. The difference is between a judgment against the *corporation ITSELF*, (for that *may* be a forfeiture,) and a judgment of ouster against *individuals*. God forbid that the rights of the *innocent* should be lost and destroyed by the offence of *individuals*!

Before the act of 11 G. 1. c. 4, (which took its rise from a case of the corporation of *Banbury*,) the corporation that had slipt the time of election of their chief officer could not proceed by their *own* power: but the *king* might have *given* them the power, by *reviving* and *reanimating* them. The corporation



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corporation only lay *dormant and quiescent*, till *revived and restored* to their activity.

And here the crown have *restored and revived* all the rights and privileges of this corporation.

The consequences, if it were otherwise, would be fatal: I mean, if the rights of *common*, of election to *parliament*, and *other rights* of 500 innocent persons were to lie at the mercy of *some* of their members only.

Therefore judgment must be for the plaintiffs.

Mr. Justice YATES concurred, "That the corporation could not be dissolved, by a judgment against *individuals*."

\* V. 4 Mod.  
58. and 1  
Shower 278  
to 281.

A distinction was made, in Sir James Smith's case, \* between a judgment against the corporation it self, and a judgment against particular members of it.

*Colchester* is a burrough by *prescription*: and they are afterwards incorporated by such and such names, &c; and officers given to them. But the *removal of their officers* can not extinguish their rights: no more can the *change of their name*; as it is laid down in *Luttrel's case* 4 Co. 87. b. expressly.

As to the debt now demanded—The *Scarborough case* in 3 Lev. 237, 238. is very applicable. There, the name in which the action was brought was the *new name*.

In 1 Lutw. 508, *Knight et Ux. v. Corporation of Wells*, where the corporation were sued by their old name, the objection was made to the *name* only; none at all, to the *action*.

As to the retaining rights of common and other rights—He mentioned the case of *Mellor v. Spateman*, in 1 Saund. 343. where it was agreed "That a corporation, by the change or alteration of the name of the corporation, does not lose their franchises."

Old *rights* must *remain*: it would be very unreasonable, if it should be otherwise.

Mr. Justice ASTON declared his concurrence; and that he founded it upon 4 Co. 87. *Luttrel's case*, and *Haddock's case*, in 1 Vent. 355. and *Raymond* 439.

As to the statute of 11 G. 1. c. 4.—The intent of it was not to consider such corporations as dissolved, and to grant them *new* powers, or, as it were, *new* charters, as bodies dissolved; but to *revive their activity*, and to put them *again in motion*.

1766.

Corporation v.  
Staber.

Though a new charter should grant *new rights*, or a *new name*, yet the acceptance of it does *not* destroy the *former* rights privileges or franchises of the corporation: but the corporation may use and enjoy them, as they did before. This is expressly laid down in 4 Co. 86. *Luttrell's case*, and in *Haddeek's case*, Raym. 439.

It has formerly been doubted, "In *which* of the names "the *action* should be brought": but of late, the *new* name has been thought the most proper to be used.

He was therefore of opinion with Lord *Mansfield* and the rest of the court, that in the present case, the corporation was *not* dissolved; and that the judgment ought to be for the plaintiffs.

Mr. Justice WILMOT—In those cases of non-elections upon the fixed day, before 11 G. 1. c. 4, the corporation having slipt their day or time of election, the nomination remained in the crown: so that that was just the same case then, as this is now.

RULE—(by the unanimous opinion of the court) that the POSTEA be delivered to the PLAINTIFFS.

Chave *versus* Peter Calmel Esq;

Monday, 21  
April 1766.

SIR Fletcher Norton shewed cause against a prohibition to the consistorial court of the bishop of *Exeter*, to stay their proceeding in a cause instituted there, for subduction of tithes.

Tithes lie in  
grant.

The short of the case was (as it appeared to the court) that *Carmel*, the impropiator, had employed one *Finnimore* as his agent, to collect and compound for tithes. The plaintiff in prohibition (*Chave*, the occupier,) had agreed with *Finnimore*, after the corn was cut and ready to be housed, for 5*l.* whereupon he housed his whole crop, without setting out the tithes. *Chave's* agreement with *Finnimore* was only by *parol*. The impropiator libelled in the ecclesiastical court against *Chave*, for not setting out his tithes. The defendant below, (*Chave*, the occupier) tendered the 5*l.*; and offered a plea



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CHAVE V.  
CALMEL.

a plea "That he had *purchased* the tithes, for five pounds."  
The ecclesiastical court *rejected* this plea.

Mr. *Thurlow* and Mr. *Dunning* were for the rule.

The only question was "Whether this was matter of  
" *appeal*, or of *prohibition*."

THE COURT were unanimous in the *latter* opinion.  
And they founded it upon this rejection of the plea being a  
*gravamen irreparabile*; and upon an apprehension "That the  
" ecclesiastical court must have grounded their rejection  
" upon a supposed difference between *their* law and *ours*";  
that is to say, they took it for granted, that the ecclesiastical  
court were of opinion, agreeable to what is laid down by  
their favourite writer, *Gibson* (who takes it from a note in  
Noy —,† ("That an agreement with the *agent* of a pro-  
" prietor of tithes will *not* bind the proprietor"; whereas,  
by our law, and in common sense and common justice, a  
composition by the occupier with the agent of the proprietor  
*does* bind and *ought* to bind his principal.

† V. Noy 19.  
Spencer's Case,  
and 2 Ventris  
48. *Sed qu.*

Indeed, where the ecclesiastical court have jurisdiction,  
and proceed therein according to their law, where it does  
*not* differ from ours, the rejection of a plea would be matter  
of *appeal*.

But where the ecclesiastical law *differs* from the common  
law; and the ecclesiastical court would require *greater proof*  
from the defendant below, than the common law requires;  
or would esteem an agreement *not* to bind the impropiator,  
which at common law *would* bind him; there an appeal  
could be: of *no service* to the defendant in the ecclesiastical  
court; because the superior ecclesiastical court would *equally*  
*adhere* to their *own* law, as the inferior ecclesiastical court  
had done; and would determine alike, as being guided by  
the *same* principle of determination.

Therefore, as the judges of this court supposed that in the  
present case the judge of the consistory court rejected the  
plea, *because* he thought the agreement with the agent *not*  
binding upon Mr. *Carmel* the principal, which at common  
law *did* bind him, they held this to be matter of *prohibition*,  
and not of *appeal*.

And though it had been observed "That tithes lie in  
" *grant*," yet they had no doubt that the occupier might,  
with sufficient propriety, be said to have *PURCHASED* these  
tithes,

That  
and so the  
plaintiff  
does not  
VOL.

tithes, notwithstanding the contract was only by PAROL. For, whatever might have been objected to its not being by deed, *if* this corn had been standing; or *if* it had been a sale by the proprietor of the tithes to a *third* person; yet the *present* case is by no means liable to such an objection: for the corn was here severed from the ground, and ready to be housed; and it was not a sale of the tithes by the proprietor to a *stranger*, but a *composition* between the proprietor and occupier, *pro hac vice tantum*.

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CHAVE V.  
CALNEL.

RULE for PROHIBITION made absolute.

Dr. Bettessworth *versus* Hugh Parker Bell Esq;

**M**R. Serjeant Whitaker had moved to set aside a *habeas corpus cum causa, ad faciendum et recipiendum*, &c. directed to the gaoler of Aislebury, returnable before the chief justice, immediate.

Hab. corp. ad satisf. & recip. may be returnable immediate and before a judge.

His 1st objection was that such a writ can not be made returnable immediate, nor before the chief justice: for by a rule made in 1654,\* no *habeas corpus ad faciendum et recipiendum* &c. can be returnable but in court, and at a day in term; except in London and Middlesex.

\* There is such a rule, Michaelmas Term 1654, Section 7.

"*corpus cum causa ad satis faciendum et recipiendum* directed to any sheriff other than London or Middlesex, not to be returnable immediate, or in the vacation time, but at a day certain in court, in the term; unless it be to deliver over to prison, in discharge of his bail."

"That a *habeas*

2d objection. It is contrary to the statute of 4, 5 W. & M. c. 21. "For delivering declarations to prisoners": † for they have already declared against him in custody of the sheriff of Bucks.

† This act (§ 2 & 3) gives leave to declare against prisoners in custody of gaolers; alledging "in custody of what sheriff or other person, &c. the prisoner is."

Sir Fletcher Norton now shewed cause.

1st. This writ issued in term; it is tested the 11th of February: and it is and ought to be returnable immediate; which only means within due and convenient time.

2dly. By 4, 5 W. & M. c. 21, the plaintiff may declare against a person in custody of the sheriff: and we have done so. But it does not follow, that we can not afterwards remove him.

That act was made in ease and for the benefit of plaintiffs; and so the preamble expressly declares. It only permits the plaintiff to charge the defendant in custody of the sheriff: it does not hinder from removing him afterwards.



1766.

Dr. BATES-  
WORTHLEY  
BELL.

This is a mere matter of *practice*: and the practice is agreeable to what is here done.

Mr. Serjeant *Whitaker*, in reply—1st. As to being *tested* within the term—It is necessary that *every* writ should be so. But it was not *delivered* till the 3d of *March*. It must be *returnable* at a day in term.

2dly. After charging him with a declaration in custody of the sheriff of *Bucks*, they can not remove him by *habeas corpus*, till after judgment.

Mr. Justice *WILMOT*—There is no foundation for setting this writ aside. It is *tested in term*: which it ought to be.

The rule is an old rule made in 1654; and seems to have gone in *desuetudinem*. It was made long before the act of 4, 5 *W. & M.* And that act only gives the plaintiff leave to declare against him in custody of the sheriff: it does not take away the plaintiff's common law right "To remove him." He has a prior right to it: and the act leaves him, as it found him, in *that* respect.

Mr. Justice *YATES* concurred.

The rule made in 1654 does not apply, since the statute of 4, 5 *W. & M.* which takes away the *reason* of it. It does not stand in the way of this *habeas corpus*, now. And even under that rule, there is an exception where it is to deliver over to prison in discharge of bail.

2dly. The plaintiff has a right to change the custody of the defendant into that of the proper officer of this court.

I am of opinion it is right.

Mr. Justice *ASTON* concurred.

1st. The old rule seems to have been totally *disused*.

2dly. That act of 4, 5 *W. & M.* leaves the plaintiff as it found him. He is not precluded, by having charged him with a declaration, in custody of the *sheriff*, from afterwards removing him into the custody of the officer of *this* court.

Per

Easter Term 6 Geo. 3. B. R.

1877

Per Cur—

1766.

MOTION DENIED: and the defendant committed to the custody of the marshal.

Dr. BETTES-  
WORTH V.  
BELL.

### Rex versus Inhabitants of Ingleton.

See this case ABRIDGED, in the Table; and at large in the Saturday, 26  
Quarto-Edition of my SETTLEMENT CASES, No. 179. April 1766.  
Pa. 560.

### Rex versus The Rector of St. Anne's (Soho.)

Monday 28  
April 1766.

SIR Fletcher Norton, on behalf of Dr. Jackson, shewed cause against a *mandamus* prayed to be directed to the rector of St. Anne's within the liberty of Westminster, requiring him to nominate and appoint a *parish-clerk* for the said parish, according to the form of a \* statute in such case made and provided; in the room of ——— Pynnot deceased.

Mandamus to  
rector to appoint  
parish clerk.

\* A private act  
of parliament,  
temp. Car. 2.

He said, Dr. Jackson had been already nominated and appointed by the rector, (Dr. Samuel Squire, bishop of St. David's.)

Mr. Serjeant Glynn, *contra*, objected that Dr. Jackson was nominated by the RECTOR, only: whereas by the act of parliament, the *consent of the vestry* is necessary to confirm the rector's nomination or appointment; which consent and approbation of the parish has *not been given*.

Therefore it is *no election*, or effectual nomination, or regular appointment of Dr. Jackson.

The fact appeared to be thus—Notice was given to the parish, "To meet on the 5th of December, to receive the rector's nomination." The clause in the act was read at that meeting; which clause impowers the rector to nominate. Then his nomination (under hand and seal) was read. Eighty-nine of the principal inhabitants signed their approbation. None dissented, expressly: but *some* of the parishioners demanded a poll, on behalf of one Mr. MOORE. The



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Rev.  
Rector of St.  
Anne's Soho.

church-wardens refused to take any poll: alledging that there was *no election*, and therefore could be no poll for *him* as a candidate.

THE COURT held this to be NO DISSENT to the rector's nomination of Dr. Jackson. It was an attempt to put up another for election; supposing "That they had a right to elect;" which, in fact, they had not. This was a *mistake*: and this demand of a poll was all *nugatory and void*. It was no DISSENT to the nomination of Dr. Jackson. If a poll had been taken, it does not appear that Dr. Jackson's nomination would have been dissented to. If the majority were really dissentient, they should have DECLARED their dissent. But what was here done, was all lost and thrown away: it had no more effect, than if they had gone away without giving either assent or dissent.

Therefore there is in the present case no right that is worth trying: and consequently, it would answer no purpose "to put the parish to any further charge."

Let the RULE be DISCHARGED.

### Postlethwaite *versus* Parkes.

Tuesday 29  
April 1766.

Father cannot maintain action for assaulting his daughter being of age, and then in service of another person, and getting her with child, per quod servitium amisit.

THIS was an action of trespass *vi et armis* for an assault upon the plaintiff's daughter, and getting her with child: and the declaration concluded with a *per quod servitium amisit*.

It was tried before Mr. Justice Bathurst; and a verdict was given for the plaintiff on the second count, and 40*s.* damages.

A special case was stated, to this effect—The plaintiff's daughter, being 23 years of age, hired herself to one Saul, as a servant; and went to live with Saul her master, and served him some time. During her service, she was gotten with child, by the defendant; and becoming big with child, and unable thereby to perform her service as she was used and ought to do, she was discharged by Saul her master, who paid her her wages in proportion to the service she had already done him; and the plaintiff her father received her, when no one else would, and lodged and boarded her in his house. She was there delivered of a male bastard-child, in November following: and the plaintiff, her father, maintained her in her lying-in, at his own expence.

The question which arose at the trial, and which was reserved for the opinion of this court, is, "Whether the plaintiff can maintain this action."

Mr.

Mr. *Davenport*, for the plaintiff, endeavoured to shew that he could,

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POSTLETH.  
WAITE V.  
PARKES.

The 1st question is "Whether the father and daughter can be considered as *master and servant*."

2d question "Whether her age makes any difference in the case"; as she was upwards of 21; viz. 23 years of age.

First—The action is maintainable by the *father*, upon the foot of being her master; as he has alledged "*per quod servitium amisit*." He agreed, that no action would lie, but by reason of the loss of her service. So are the cases in 1 *Bulstr.* 373. 2 *Lutw.* 1497. 1 *Ro. Rep.* 393, 394. *Cro. Eliz.* 769, 770. *Barham v. Dennis.* Sir *T. Raym.* 259, *Hunt v. Wotton*, 31 C. 2. in *Scacc.* Style 398. *Norton and Jason*: which is cited in *Raymond* 260. and was an action for breaking and entering the plaintiff *Jason's* house, and assaulting his daughter, and getting her with child of a bastard, *per quod servitium amisit*. Roll, Ch. J. thought that the father might have an action for the loss of her service caused by this.\* So *Bro. Abr.* Title *Trespass*, pl. 422. and *Russell v. Corne*, in 2 *Ld. Raym.* 1032. and 6 *Mod.* 127. S. C. prove that it is necessary to say "*per quod servitium amisit*," but *per Holt*—"No action lies for assaulting and getting a daughter with child: but if he that has done it, enters his house, and assaults his daughter and gets her with child, he may maintain an action for entering his house and assaulting his daughter, and getting her with child, *per quod servitium amisit*." It may be added as aggravation, *inter alia enormia*. And 1 *Sid.* 225, *Sippora v. Bassett*, shews, in what cases damages may be given, and evidence allowed, for *alia enormia*.

\* Roll added,  
"But is a pretty  
"case, and fit  
"to be argued.  
"Therefore  
"bring us  
"books: and  
"we will advise  
"upon it."

*Saul*, the master, here sustained no damage: for he discharged her as soon as she became unserviceable to him; and paid her her wages only in proportion to her past service.

The father may justify an action for a battery brought against him by one who was assaulting his child. 1 *Bacon's Abridgement*, 155 letter C. A father has an interest in all his children: he had a writ *quare filium et heredem rapuit*. He must provide for them; and ought to receive comfort from them: and if any take them from him, he ought to have a remedy for the injury.†

† V. *Cro. Eliz.* 770.

Here a daughter goes out to service, within three miles of her father's house: she is gotten with child, discharged, and



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PARSONS  
V. ATLAS  
MARRA

returned upon her father, helpless and unable, in that condition, to maintain herself. He is obliged by 43 *Eliz. c. 2*, to maintain her; and did so from the necessity of the thing. Therefore, from the consequential damage, an action is maintainable by her father in whose house she resided; and where she must, in this case, be considered as a servant.

2d point—Her being 23 years of age makes no difference. This young woman's master could not bring an action against this defendant; no-body but the father could sue. And the damage is the same to him whether she be over or under 21.

He argued, that this case could not be considered upon the foot of emancipation; and concluded with praying judgment for the plaintiff.

Mr. Wallace, *contra*, for the defendant.

The foundation of actions of this kind has been the *loss of service*.

The father's interest in the child, whatever it might have been during infancy, ceases at the child's coming to the age of 21.

Many injuries may be done to a child, which are not the subjects of actions by the father.

Indeed an action will lie by a father, for *taking away* his son, or his daughter, *F. N. B.* 3d Edit. pa. 260. And the father has an interest in his heir, *Radcliffe's case*, *Plowd.* 267. b.

But an action will not lie by the father for *debauching* his daughter. So was *Holt's* opinion, in 2 *Ld. Raym.* 1032, *Russell v. Corne*.

If the father maintains the daughter in his *own house*, he is intitled to her service and may maintain an action for the loss of her service. But here, she was hired out to service in *another man's house*.

As to the father's being *obliged* to maintain her—Such an obligation can arise only from 43 *Eliz. c. 2*. But here it is not stated, either that she was *unable* to maintain herself; or that the father was *able* to maintain her.

If she had been *under age*, and *under her father's roof*, I would agree that he had been intitled to an action as for the loss of service.

*Barham v. Dennis*, in *Cro. Eliz.* 769, 770, was not determined: but three judges, (*Anderfon*, *Walmesley*, and *Kingmil*) held "That the father shall not have an action for the taking of any of his children which is *not* his heir."

*Cro. Eliz.* 55. *Gray v. Jefferies*: "Trespass for beating the son, lieth not for the father."

The *infancy* was the ground of the action in *Roym.* 259, *Hunt v. Wotton*: the son was an infant under the age of discretion.

They can produce *no instance*, *no precedent* of such an action as this is: and their *principle* will not hold; because it depends upon the *loss of service*, (which was *not* the present case.)

N. B. It appeared that the parties were *poor*.

THE COURT proposed a compromise; which was accepted; it was—"That all proceedings be stayed, without costs on either side."

RULE, by consent, accordingly.

LORD MANSFIELD, addressing himself to Mr. *Wallace*, said to him—"It is not upon any doubt, in point of law, that I propose this compromise": meaning (I suppose) that he was clear *with* Mr. *Wallace*, "That this action could *not* be maintained." And on this supposition, I have ventured to report it, though it was not determined judicially and in form. However, there can be no doubt, but that the court were all of opinion "That the action could *not* be maintained:" and therefore, in compassion to the plaintiff, whose daughter had been injured by the defendant, they wished to save him from the payment of costs.

Rose ex dimiss. Vere et al. *versus* Hill.

ON the trial of this cause at *Coventry* assizes, on 26th *March* 1766, it appeared that *Thomas Hill*, the father of the defendant, being seised in fee of the premises in question, upon the 9th of *July* 1754, duly made his will

Devisé by testator to his five children, and the survivors and survivor of them, and the executors and administrators of such survivor share and share alike, as tenants in common, and not as joint tenants, is a tenancy in common in fee.

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POSTLETHWAITE &amp; PARRIS.



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ROSE, ex dimiss.  
VERE et al. v.  
HILL.

in such manner as by law is required for devising real estates; and thereby devised as follows; viz. "I will that my just debts and funeral charges and expences which I shall justly owe at the time of my decease, be, in the first place, paid by my executors herein after named: and as to my estate both real and personal, I dispose thereof as follows—First, I give and devise all that my messuage, &c. (being the premises in question, and the whole estate of which he was seised,) also all other my messuages lands tenements and hereditaments in the said city of *Coventry* or elsewhere, unto which I am in any wise intitled, unto my dear wife *Mary*, for and during the term of her natural life; and from and after her decease, I give and devise the same premises, every or any part thereof, to and to the use of *Anne, Thomas, Mary, William and Nathaniel* my sons and daughters, and the survivors and survivor of them, and the executors and administrators of such survivor, *share and share alike*, as tenants in common, and not as joint-tenants; chargeable with the mortgage or incumbrance already made by me, of the same premises or some part thereof, to Mrs. *Yardley* of the said city of *Coventry*, for the sum of 100*l.* and interest and as to for and concerning all the rest and residue of my goods, chattels, ready money, debts and securities for money, plate, household goods, utensils in my trade or business, and all other my personal estate whatsoever and wheresoever, and of what nature kind or quality the same are, and not otherwise by this my will given and disposed of, I give and bequeath the same and every part thereof unto *Anne, Thomas, Mary, William and Nathaniel*, my sons and daughters, and the survivors and survivor of them, and the executors and administrators of such survivor, *share and share alike*, as tenants in common, and not as joint-tenants. And I constitute my said dear wife, my daughter *Anne*, my son *Thomas*, and my daughter *Mary*, executors of this my last will and testament."

That soon after making this will, viz. in *August* following, the testator died, without having revoked or altered the same, seised of the premises in question. That on his death, *Mary* his widow, who survived him, entered and enjoyed the premises during her life. And that his said sons and daughters all survived him.

That his said daughter *Anne* married *Richard Burbury*; and died intestate, the 19th of *November* 1759, without issue.

That his said daughter *Mary* was never married; and died in *September* 1764, intestate.

That

That *Mary*, the testator's widow died in *October 1764*: and his said son *William* died intestate the 20th of *January 1765*: and was never married.

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ROSE ex dimiss.  
VASE et al. v.  
HILL.

That the said *Thomas Hill*, the eldest son and heir of the said testator *Thomas Hill* immediately upon the decease of his mother *Mary*, entered upon and took possession of the said premises; and afterwards, viz. on the 9th of *February 1765*, by indentures of lease and release dated 8th and 9th *February 1765*, made between himself of the one part and the said *George Lilley* (one of the lessors of the plaintiff) of the other part, conveyed one undivided moiety or full half part, undivided, of and in all the premises in question, to and to the use of the said *George Lilley* his heirs and assigns for ever; subject to redemption on payment of 340*l.* and interest, to the said *Lilley*, on the 9th *August* then next ensuing.

That the said *Thomas Hill*, the mortgagor died in *May 1765*; leaving the defendant *Nathaniel* (who was the youngest child of the testator *Thomas Hill*) his brother and heir; who, on his said brother's death, took possession, and has ever since been in possession, of all the real estate devised by his late father as aforesaid; claiming the whole thereof, and insisting "That under and by virtue of the said will, he is intitled to the whole thereof, as being the SURVIVOR of all his said brothers and sisters." It also appeared, that the mortgage referred to in the testator's said will was a term for years, which has since been satisfied, and by assignment vested in the said *James Vere* and *Dorcas Yardley*, lessors of the plaintiff: and it was agreed by all parties in this cause, "That the said term should not be set up, but be considered as surrendered or otherwise determined;" and "That nothing should be insisted on by or between the parties on either side, but the true construction and legal operation of the said testator's will, as to what estates thereby passed to his children respectively."

It further appeared, that the said *George Lilley* was unpaid his said mortgage-money; and that this ejectment was brought to recover a moiety or half part, undivided, of and in the premises in question; to which the said *George Lilley* set up a title under and by virtue of the abovementioned indentures of lease and release: but the defendant insisted, that by his late father's said will, he, as surviving devisee, had a right to all the said premises, on the death of his said brother *Thomas*, notwithstanding the said indentures.

By



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ROSE ex dimiss.  
V. HILL  
HILL

By consent of the counsel on both sides, the jury in this cause gave a verdict for the plaintiff; subject to the opinion of the court of *king's bench* upon the following question; viz.

"WHAT estate passed from the said *Thomas Hill*, the eldest son and heir of the said testator *Thomas Hill*, to the said *George Lilley*, by the said indentures of the 8th and 9th of *February 1765*, in any and what part of the premises in question: and whether the plaintiff is intitled to recover any and what part thereof in this ejectment."

Mr. *Wheeler*, for the plaintiff, argued that the lessor of the plaintiff was intitled to recover a moiety of the estate: for, it was either a tenancy in common in fee, in the five children of the testator; or, it was a tenancy in common for life, and the reversion in fee remained in the testator; and three parts of that reversion in fee descended upon the lessor of the plaintiff.

Mr. *Caldecott*, contra, for the defendant, agreed, that if either of Mr. *Wheeler's* constructions would prevail, the judgment ought to be for the plaintiff. But he argued thus—*Nathaniel Hill*, the defendant, is the survivor of all the five children: and the true construction of the will is "That it was a tenancy in common amongst the five children, for life: with SURVIVORSHIP to the longer liver of them." Therefore, upon this construction, the right is in the defendant: who is intitled to the whole, as the last survivor.

Mr. *Wheeler* was stopt from replying: the court thinking the case sufficiently clear, on his side.

Lord MANSFIELD stated the case and the will; for the sake (as he declared) of the students.

After which, his lordship proceeded as follows—

The question is "Whether the conveyance of one half, by *Thomas*, be good, or not."

An estate to more than one, with a benefit of survivorship, is a joint-tenancy. But the testator has expressly declared "That they shall not take as joint-tenants." Mr. *Caldecott's* construction is therefore too refined for the testator's meaning. He meant to dispose of all his estate real and personal; and he meant to dispose of his real estate amongst his children, after the death of his wife. And he uses the same words in disposing of the real estate, as he does in disposing of the personal: and

and they explain each other. There are words in this will, which plainly shew that he meant his estate to go to the representatives of his children, after their deaths; though he has used improper terms.

It is plain that they were *not* to take as joint-tenants; and it is plain to me, that he considered that several of his five children might happen to die in his own life-time; and therefore makes a provision for such of them as should survive him, and be in existence at the time when the interest was to vest, and their representatives. He meant to prevent a lapse. And therefore we may rather apply the words to a fixed particular time, than give no meaning at all to them. And this is agreeable to the case of *Stringer v. Phillips*,\* 18th December 1730, at the Rolls.

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Rox ex dimiss.  
Vend et al.  
Hil. 1766.  
1111

\* See Eq. Ca.  
Abr. vol. 1.  
pa. 292. c. 11.

But, as against the defendant, it is enough to say "That it can not come to him by survivorship."

Mr. Justice WILMOT concurred. He thought the true construction to be, that these words "survivors and survivor" were inserted in order to prevent the consequence of any lapse, by any of the testator's children dying in his own life-time.

He meant his children to be all equal; and if one only or more should survive the rest, at the time of his death, the clause means "That the share or shares of such survivor or survivors should go to them and their representatives;" but he could never mean to exclude the children of any of his children who should leave any. This will gives the absolute fee to all, as tenants in common: (for, "executors" is equivalent to "heirs," in a will.) But if it did not, yet the plaintiff would be intitled, as heir at law, to the reversion.

Mr. Justice YATES (who tried the cause) concurred.

The testator's intention is as plain as can be. He says, "His children shall take as tenants in common, and not as joint-tenants." And the words "survivors and survivor" shall not destroy and control this plain intention: in support of which opinion, he cited 3 Lev. 373. *Blisset v. Cranwell et al.* and 1 Salk. 226. S. C. And also the case of *Stringer v. Phillips*, beforementioned by Lord Mansfield.

Lord MANSFIELD and Mr. Justice WILMOT likewise mentioned the cases of *Hawes v. Hawes*, 25th September 1747. and *Marriot v. Townley* 27th June 1748. And a case of



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of *Stones v. Hearteley et al.* 25th November 1748, in chancery; which was this—*John Stones* having issue four children, viz. *John*, his eldest son, and *Dinah*, by his first wife; and the plaintiff (*Francis*) and *Mary*, by his second wife; by will, 13th April 1723, *inter alia* directed that the remainder of his estate which he was intitled to at the death of his aunt *Mawhood*, should go to and be equally divided amongst his three children, *Dinah*, the plaintiff *Francis*, and *Mary*, and the survivor of them, and their heirs for ever. Four children survived the father. *Mary*, the plaintiff's sister, died an infant, in the life-time of Mrs. *Mawhood*. *John Stones*, the son, died; leaving his sister *Dinah*, of the whole blood, his heir. *Dinah* died; leaving the defendant, her infant son. Question—"Whether the plaintiff should take, as survivor."

Lord Chancellor went upon the case of *Blisset and Cranwell*; and held it to be a tenancy in common.

In the present case, THE COURT were unanimous, that it was a tenancy in common, in fee; and that the words "*survivors and survivor*" relate to the death of the testator.

Per Cur—

Let the POSTEA be delivered to the PLAINTIFF.

Friday, 2 May  
1766.

Broker about to sell goods of an insolvent, promises landlord to pay him his rent, if he will not distrain, this promise need not be in writing.

Williams versus Leper.

ONE *Taylor*, a tenant to the plaintiff, being three quarters of a year (which amounted to 45 l.) in arrear for rent, and insolvent, conveyed all his effects for the benefit of his creditors. They employed *Leper*, the defendant, as a broker, to sell the effects: and accordingly, he advertised a sale. On the morning advertised for the sale, *Williams* the landlord came to distrain the goods in the house. *Leper* having notice of the plaintiff's intention to distrain them, promised to pay the said arrear of rent, if he would desist from distraining: and he did thereupon desist.

At the trial, a verdict was found for the plaintiff, for 45 l.

The question was whether the verdict should be entered up for 45 l. or for a smaller sum (7 l. 5 s.) the promise not having been reduced to writing.

\* V. 29 C. 2.  
c. 3. § 4.

It

It was \* now argued by Mr. *Morton* and Mr. *Walker* for the plaintiff; and by Sir *Fletcher Norton* and Mr. *Wallace* for the defendant.

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The counsel for the plaintiff spoke to this effect.

It is objected on the part of the defendant, "That this is  
" an undertaking or special promise for the debt of *another*  
" person, *within the statute of frauds*; and therefore ought to  
" have been reduced into writing."

\* It had been debated, at the trial: so that the counsel were apprized of the arguments and cases that would be urged against them.

Answer—

But this is *not such* a special promise for the debt of *another*, as is within the statute of frauds. That statute only meant to prevent parol promises, where there was *no new* consideration moving from the party making the promise to the party to whom it was made: it was not meant to prevent *direct* undertakings; but only † *collateral* ones, for the debt default or miscarriage of *others*. Whereas here was a *new* consideration: for, the goods of *Leper* were, at the time of the promise, liable to the landlord's distress.

† V. ante,  
374, 375, 376.  
*Harris v.*  
*Huntback.*

The case of *Rothery v. Curry*, Tr. 21 G. 2. in C. B. has been urged by the defendant's counsel, as in point. But *that* was only putting him off from suing: "in consideration that  
" the plaintiff would not sue *A. B.*" It was held to be within the statute.

2 *Ld. Raym.* 1085. *Buckmyr v. Darnall*—"In consideration that the plaintiff would lend two geldings to *A. B.* and  
" *C. D.* they should return them"—was held to be collateral and within the statute. 1 *Salk.* 28. S. C. (but there called *Bourkmire v. Darnell*.)

Tr. 32, 33 G. 2. C. B. *Fish v. Hutchinson*, was for a debt of another: "J. S. being indebted to the plaintiff in 8*l.* 4*s.*  
" the defendant promised to pay the costs, if the plaintiff  
" would discontinue the action": which he did. The promise, not being in writing, was holden void, by the whole court.

But *those* were mere naked promises by persons not obliged to answer for the debt or demand, on their *own* account. The present case is a *direct* undertaking, *for himself*, and *not for another*. The plaintiff had a legal interest in these goods, prior to the bill of sale; and has been deprived by the defendant



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defendant of an advantage, which he can never have again. The property of these goods was in *Leper*, as trustee for the creditors, at the time when he made this promise. It is an *original* undertaking.

The case of *Reid v. Nash*, Tr. 1751. 24, 25 G. 2. B. R. is in point—"In consideration that the plaintiff would withdraw his record, and not try the cause, he promised to pay 50*l*." That was an *original* undertaking. So, in 5 Mod. 205. *Stephens v. Squire*—It was not a promise for a debt of another person: the defendant was *himself* originally liable. It was a promise to pay 10*l*. and costs of suit, in consideration "That the plaintiff would not prosecute the action."

This promise "To pay the arrears, if the plaintiff would desist from distraining," is a *new* express promise, and not within the statute. Therefore it was not necessary that this promise should be in writing. It was *not* a *collateral* undertaking; but an *original* one.

The counsel for the defendant insisted, that upon *this* declaration, coupled with the facts given in evidence, the plaintiff had no right to recover this 45*l*. For, the declaration expressly charges "That *Taylor* was indebted to the plaintiff in 45*l*. for  $\frac{1}{4}$  of a year's rent; and that the defendant undertook to pay it;" which is directly within the words of the statute of frauds "a special promise to answer for the debt of another person."

LEPER was in possession of the goods of the tenant, who owed the plaintiff three quarters rent; and about to sell them. The landlord comes to distrain for this three quarters of a year's rent. *Leper* promises to pay it, "if he will desist from distraining." He promises *absolutely*—"to pay it;" not "to pay it out of the goods sold," or under any other restriction.

A forbearance to sue, is a good consideration for an *assumpsit*.

V. sect. 4.

Before the statute of frauds, *all* promises were binding; whether *original*, or *collateral*. But that statute says, "that where one promises for the debt default or miscarriage of another the promise must be in writing."

The cases of *Fish v. Hutchinson*, and *Reid v. Nash*, are both upon the same principle: both were *collateral* promises. The second promise did not extinguish the original debt: it did not extinguish the action. Therefore both were liable for the same debt. The original debtor remained liable: and therefore the promise was *collateral*, and consequently within the act.

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act. Indeed, if the original debtor is discharged, then it is an original promise and not collateral; which was the case of *Reid v. Nash*: that was an action of trespass for assault and battery brought by *Reid* against *Johnson*; and the defendant promised "That if the plaintiff would withdraw his record, he would pay 50 l. &c." It was an original tort. Therefore that case was not contrary to *Fish v. Hutchinson*; but determined upon the same principle.

The plaintiff can not recover upon this declaration: it is upon a promise "to pay the debt to which *Taylor* was before liable;" and *Taylor* still remains liable, till actual satisfaction. Therefore this is a collateral promise: and both are liable. Consequently, 'tis within the act.

If indeed the declaration had averred "That *Leper* promised to pay it out of the produce of the goods when sold; and that in consideration of that promise, he had desisted from distraining":—that had been a different case.

Lord MANSFIELD.—The evidence went further than the declaration states. The declaration does not state whether the promise was in writing, or not: the evidence shews it was not. But both are consistent.

This case has nothing to do with the statute of frauds.

The *res gesta* would intitle the plaintiff to his action against the defendant.

The landlord had a legal pledge. He enters, to distrain: he has the pledge in his custody. The defendant agrees "That the goods shall be sold, and the plaintiff paid in the first place." The goods are the fund: the question is not between *Taylor* and the plaintiff. The plaintiff had a lien upon the goods. *Leper* was a trustee for all the creditors; and was obliged to pay the landlord, who had the prior lien. This has nothing to do with the statute of frauds. It is rather a fraud in the defendant, to detain the 45 l. from the plaintiff, who had an original lien upon the goods.

Mr. Justice WILMOT thought this case out of the statute of frauds. This is not a collateral promise to pay the debt of another.

The case of *Reid v. Nash* does not clash with the other determinations on the statute of frauds. That was an original undertaking;



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undertaking : the debtor was never liable for that particular sum of 50 *l.*

But *this* case is not within the spirit or meaning of the act. The tenant was here the original debtor. The plaintiff had two remedies against him. The defendant made a bill of sale of the goods liable to the plaintiff's distress. The plaintiff is in possession of the goods ; having entered with intent to distrain them. *Leper* was the agent for the creditors. He makes this promise, in order to discharge the goods of this distress. I consider this distress as being actually made. *Leper* says " If you will quit the goods, and *disincumber the fund*, I will pay you."

*Leper* became the bailiff of the landlord : and when he had sold the goods, the money was the landlord's (as far as 45 *l.*) in his own bailiff's hands. Therefore an action would have lain against *Leper* for money had and received to the plaintiff's use.

Mr. Justice YATES—It was not necessary to state in the declaration, " That the promise was in writing."

This declaration states a promise " to pay the arrear of " rent amounting to 45 *l.*" (a specific sum.) The defendant was in possession of the goods, and about to sell them. The plaintiff entered, with intent to distrain them for 45 *l.* The defendant says—" Let me go on to sell them ; and I will pay " you the 45 *l.*" He undertook to pay this, in all events, peremptorily and absolutely. This is an original consideration to the defendant.

Therefore he concurred in being of opinion for the plaintiff ; and that the verdict should be entered for the sum of 45 *l.*

Mr. Justice ASTON—If this was a promise to pay the debt of *Taylor*, I should think it within the statute, upon Sir *Fletcher Norton*'s distinctions ; which are the true ones.

But I look upon the goods here to be the debtor : and I think that *Leper* was not bound to pay the landlord more than the goods sold for, in case they had not sold for 45 *l.*

The goods were a fund between both : and on that foot, I concur.

But

But otherwise, I should have thought (with Sir Fletcher)  
 "That the case of *Reid v. Nash* does not clash with the other  
 "determinations about collateral promises."

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 LEFER.

POSTEA to be delivered to the PLAINTIFF:  
 and the verdict to stand for the whole 45 l.

Butter *versus* Heathby.

Tuesday, 6  
 May 1766.

THIS was an action upon the *case* against the defendant,  
 for not fetching away his tithes in a reasonable time.\*

\* Note. It  
 must be *case*:  
 not *mal-feasance*.

*trespass vi et armis* will not lie; because it is only a *non-feasance*, not a  
*mal-feasance*. V. *Latch*. 3. *Stilman v. Chanor*; and 1 *Ld. Raym.* 188. *Shapcott v. Magford*.

The declaration states, that the plaintiff set out the tithes;  
 and the defendant refused to fetch them away.

Notice of set-  
 ting out tithes  
 is not by com-  
 mon, though by  
 ecclesiastical law  
 it is, necessary  
 to be given by  
 occupier to  
 owner.

At the trial, the defendant's counsel insisted on a *custom* in  
 the parish, "That notice should be given to the owner of the  
 "tithes, of the *setting them out*."

The *proof* of the custom was not entered into, at the trial:  
 but the *validity* of the custom was discussed.

Mr. Justice Gould, who tried the cause, held the custom  
 not to be a good one: and a verdict was found for the plain-  
 tiff, and 30 guineas damages; subject to the opinion of this  
 court upon the following

Question—"Whether this *custom* be good in law, or not."

A motion had been made for a new trial; and a rule to  
 shew cause. It was argued on *Thursday* last, by Mr. Ser-  
 jeant Burland, Mr. Thurlow, and Mr. Mansfield, on behalf  
 of the plaintiff (the occupier;) and by Mr. Serjeant Davy  
 and Mr. Dunning, for the defendant (the impropiator.)

The counsel for the plaintiff denied this to be a good cus-  
 tom; 1st. Because it was only setting up the *ecclesiastical* law,  
 against the *common* law of the kingdom: 2dly. This can not  
 be done by custom in any *particular district*.

The farmer is not bound by *common* law, to give previous  
 notice of the time of his setting out tithes.



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HEATREY.\* V. Nov. 19.  
Spencer's case,  
and 2 Ventr.  
43. accord.

Mr. Justice WILMOT—By the *common* law, no notice is necessary: \* by the *ecclesiastical* law, it is necessary. The question therefore is, "Whether the *ecclesiastical* law can be introduced, under the notion of such a custom."

THIS was agreed to be the question.

The plaintiff's counsel objected, that this custom is *not* a reasonable or good one; because it is not founded upon any *consideration*. And admitting the *canon* law to be as has been mentioned, yet it can not be set up against the *common* law of the kingdom: at least, it ought to have been *pleaded*. It can be no bar to this action, or to the form of it. For, it is not alledged "That these tithes were not *fairly* and *honestly* set out:" and *if* they were fairly and honestly set out, they ought to have been taken away by the impropiator.

The farmer can receive no benefit by giving such notice: on the contrary, he may be much incommoded by being bound down to set them out the particular time notified. For he can't carry *any* away, till he has set out the *whole*: and a *lay-impropiator* may reside out of the parish, and at a very great distance; or the farmer may not know *to whom* notice is to be given, or *where*; or have *time* sufficient to admit of giving such previous notice of setting them out.

Indeed notice to the owner of the tithes, "of their *HAVING* been set out," is previously necessary to the bringing an \* action for not carrying them away. And *this* notice was given.

\* V. 2 Ventr.  
43. accord. and  
1 Ro. Abr.  
643. title  
"Dismes,"  
letter X. pl. 1.  
and Bacon's  
Abr. vol. 5.  
p. 106.

But the defendant insists that there ought to have been previous notice "of setting them out."

*Beaver v. Spratley*, in *Bunbury* 333, is the only case to be met with on such custom as this: and that case was never determined. Two judges against one, seemed to think "That it was *bad*."

The counsel for the defendant, who argued in support of the rule for a new trial, admitted "That the *common* law does not require the notice of setting them out:" but this custom *does* require it; and they insisted that it is a *good* custom.

This custom falsifies the demand made by the declaration. For, the declaration alledges, "That the parishioner has been always used to set out the tithes so and so; and that

" he

"he set them out in due manner; and the defendant neglected "to take them away." The defendant shews this custom; and that, for want of pursuing it, these tithes were *not* in due manner set out. And if they were not set out in due manner, then he was under no obligation to take them away.

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'Tis part of the definition of a custom, "That it differs "from the common law." We do not say, 'tis good, *because* it is agreeable to the canon law: we only say, "It is "good, as being the *lex loci*." It is the law of the land, *here*, in this parish.

The consideration of customs can not be inquired into: however, if it were necessary to do so, *honesty* and *piety* are sufficient considerations for this custom. But customs must be *presumed* to have sprung from good considerations.

This custom prevails in half the parishes in the West of England: and as tithes depend, in a great measure upon custom, so also does the manner of setting them out.

The parson can not set them out *himself*: but by 2 Ed. 6. c. 13. § 2. he may come upon the land, and *see* it done. And this statute directs tithes to be set out according to the customs of the respective parishes.

The custom does not *require* the parson to be present; nor does it fix the tenant to reap his corn in bad weather: it is only a check against injustice being done to the parson. A *reasonable* notice is all that is requisite. If the custom should be abused, the tenant would be restrained from making an ill use of it.

From † *Hutton's* opinion to Lord Ch. J. *Lee's* time, and by † See Noy 19. Spencer's case: *Godolphin* expressly, such previous notice of setting out, is necessary by the ecclesiastical law. "It was said by "Hutton that "by the civil "law &c."

The case in *Bunbury* is an instance in support of the custom. There, indeed, † *personal* notice was insisted on. But † That does not perhaps, quite clearly appear; though there is enough to justify this observation, upon the strict words of the report. we do not require *personal* notice: we say—"to himself, "agent, or servant." And it is his own fault, if he leaves the parish, and leaves no agent.

In a cause at *nisi prius*, ——— v. *Yarborough*,\* at Lincoln affizes, Lord Ch. J. *Willes* held such a custom to be good; and said, he wished it was the law of the land. \* Mr. *Wheler* mentioned this from his memory.

U u 2

And



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And it must be understood (in the present case) that this custom could have been proved.

\* It did so.

And with regard

to this point, it is only said, "That Barons Carter and Comyns thought there was something in the objection; though the Lord Chief Baron thought it well enough."

Lord MANSFIELD said it had been very well argued. It depends upon general reasoning, and the case at *Lincoln*: for that in *Bunbury* does not ascertain any thing; it went off upon another point.\* We'll think of it.

Mr. Justice WILMOT observed, that the *canon* law is no otherwise an argument in the present question, than as it may serve to shew that the custom has not been thought unreasonable.

*Curia advisare vult.*

Lord MANSFIELD now delivered the opinion of the court.

The only question is "Whether this be a *reasonable* custom or not."

There is no *authority* that comes up to this point, but one: and that was a cause on the *Midland* circuit before Lord Ch. J. *Willes*; who thought it a *reasonable* custom. I think so too.

I believe the doubt about it arose from a jealousy of receiving the ecclesiastical law in any case whatsoever; lest the clergy should introduce it by degrees.

It is reasonable, as *promotive of justice*, and *preventive of fraud*.

Mr. *Dunning* said, as of his own knowledge, "That there were such customs in the *West of England*": and I am told there are such in *Lincolnshire* likewise.

We are all clear "That it is a *good* custom." It is for the *prevention of fraud*, and for the *convenience of the parties*.

Therefore the rule must be made absolute, for a new trial, but *without costs*.

And I think it is such a custom that a very *slight* evidence would be sufficient to prove.

RULE MADE ABSOLUTE.

Oates, ex dimiss. Wigfall, *versus* Brydon et al.

**T**HIS was an action of trespass and ejectment of messuages &c in *Sheffield*. Not guilty pleaded. General issue joined. The cause was tried at the preceding assizes for *Yorkshire*, before Mr. Justice *Bathurst*: and upon the trial, it appeared in evidence, that *Grace Green* widow being seised in fee of some messuages &c, and intending to intermarry with *Samuel Wigfall*, conveyed the same to trustees, to her own use for life; and after her decease, to such uses &c, as she should either before the said marriage, or during her coverture, by her last will or otherwise, limit or appoint; and for want of such disposition, then to the use of the said *Samuel Wigfall* for life; and then to the use of her own right heirs.

Discussion of the reason and practice of confessing lease, entry, and ouster in ejectment.

The marriage took effect: and she did afterwards, in the lifetime of her husband, duly make her will; wherein, after divers pecuniary legacies &c, (some of which legacies are to the three children of *Thomas Brownhill*; and others, to the four children of *Samuel Water*;) is the following devise—  
 “ I give to *Samuel Wigfall*, my dear and loving husband, the  
 “ house where we now dwell, together with the stable and  
 “ all other appurtenances thereunto belonging, for and during the term of his *natural life*: and after his decease, I  
 “ give the said house and stable with all appurtenances unto  
 “ the said *Samuel Warbleton* my brother, if then alive, for  
 “ and during the term of his natural life; and after his decease, I give the said house and stable with the appurtenances, unto the said children of my cousins *Thomas Brownhill* and *Samuel Water*, or such of them as shall be then living, *share and share alike*. And if it happen that the said *Samuel Warbleton* be not living at the decease of the said *Samuel Wigfall*, then my mind and will is, that the said house and stable with the appurtenances be DIVIDED AMONGST the said children of my cousins *Thomas Brownhill* and *Samuel Water*, as *aforesaid*. And also all the rest of my estate which is not herein or hereby before by me given or disposed of, I do give unto the said *Samuel Wigfall* my husband.” And she appointed her said husband, and brother *Warbleton*, executors.

The testatrix soon afterwards died: and her husband survived her, and held the estate until his death, which happened in *August 1757*. At the time of his death, and at the time of the death of the said *Samuel Warbleton* (who survived the testatrix, but died before her said husband,) four of the said children of *Thomas Brownhill* and *Samuel Water* were living: one



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BRYDON et al.

of whom is still living : the other three died before the time of the demise laid in the declaration.

The premises devised to the children, at the time of making the will were, and still are worth 100*l.* to be sold, and no more : and the testatrix had no real or personal estate, except what is particularly mentioned in the will.

The defendant *Brydon* purchased the estate in question, of the children : the other defendants are tenants of the same, under him. No ACTUAL ouster was proved, previous to the bringing the ejectment. The lessor of the plaintiff is *heir at law to Samuel Wigfall*, the husband of the testatrix.

A verdict was given for the plaintiff, subject to the opinion of this court on the following

Question—" Whether the lessor of the plaintiff be intitled " to three undivided fourth parts of the premises ; and can " recover the same in this action."

It was argued on *Thursday* last by Mr. *Fearnley* for the plaintiff, and Mr. *Wallace* for the defendant.

Mr. *Fearnley* argued that the devise to the seven children was only during their lives.

Mr. *Wallace* insisted, that the seven children took an estate *in fee*, as tenants in common. And he also insisted, that the rule to *confess* lease entry and ouster *does not supply* the want of evidence of the *actual* ouster of the tenant in common.

Mr. *Fearnley* replied, that they took only an estate for life. [See 1 Ro. Abr. 834. *Fawcett's case*. Cro. Eliz. 52. *Pettywood v. Cooke* ; and *Skinner* 339. *Middleton v. Swain*.]

And as to the objection to the entering into the rule to confess lease entry and ouster—he acknowledged a dictum mentioned in 7 Mod. 39. where it is reported to be said *per Holt*—" In case of tenants in common, there must be an " *actual* ouster of one by the other : or else, he shall not be " *compelled to confess* lease entry and ouster."

But here the defendants *did* confess lease entry and ouster. There, it is only said, " That he shall not be *compelled* to do " it."

He cited 2 *Ld. Raym.* 750. *Little v. Heaton*, and 1 *Salk.* 259. S. C. to shew that it is settled, " That proof of actual " entry

"entry and ouster is *not* necessary in ejectment brought on "breach of a condition of re-entry." And so is 1 *Ventr.* 248. Anonymous. He likewise mentioned 1 *Siderf.* 223, *Langborne v. Merry*; where the court held, "That an entry shall "be intended, till the contrary be proved." [And V. 2 *Ventr.* 332. anon.]

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dismiss.  
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RAYDON et al.

THE COURT having taken a few days to look into the cases—

LORD MANSFIELD now delivered their opinion.

After stating the case particularly, and the question, "Whether an *actual* entry was necessary to have been "proved; or whether the *confession* of lease entry and ouster "be *sufficient*, without *actual* proof of it;" he observed that as there was NO *proof* of *actual* ouster, no *actual* ouster could be *supposed*: but that slight proof would be *sufficient* to be left to the jury.

However, though no *actual* ouster can be supposed, yet

We are all of opinion that the *CONFESSION* of lease entry and ouster, is sufficient to bar a *non suit* for want of proof of *actual* ouster.

We are glad to have it *settled*; because there have been different opinions.

The meaning of confessing lease entry and ouster is, to bring the matter to the mere question of the plaintiff's possessory title.

In the of *Dormer v. Fortescue*,\* an *actual* entry was holden necessary on the † *statute*: for that the word "*action*," in that statute, could not mean "*ejectment*." That was settled and established by many cases. Therefore, *to avoid a fine*, there must be an *actual* entry; and the demise can not be carried back beyond the *actual* entry.

\* H. 11 G. 2.  
B. R. and afterwards in Dom.  
Proc.

† 21 Jac. 1.  
c. 16.

In all *other* cases, the confession of lease entry and ouster is sufficient. And so it is now settled that it is sufficient for an ejectment brought upon a *condition broken*.

As to this particular case of a tenant in common—There are cases enow, to justify our opinion. He repeated the case of *Johnson v. Allen*, 13 *W.* 3. reported in 12 *Mod.* 657. And indeed it is scarce possible, he said, that a tenant in common should bring an ejectment, but where there is an *actual* ouster. 7 *Mod.* 39. 1 *Queen Anne*,—"per Holt—He shall not be compelled when he does *not* dispute the title: but where he "does dispute it, he shall be compelled to confess lease entry "and ouster."



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BETTON et al.

Therefore we are all clear that the confession of lease entry and ouster is sufficient, in the case of a tenant in common, without proof of actual ouster.

Second point. As to the construction of the will—

The question is, “Whether this house and stable were given to the seven children, only during their *lives*; or, as *tenants in common*.”

The whole value is only 100 l.

There must be something by way of *limitation*, to shew the *intention* of the testatrix: otherwise 'tis for *life only*.

But few ordinary people make the distinction between *land*, and *personal* property.

As this rule of law often operates against the intention of the testator, it shall be construed to carry a fee, where there are words of limitation, and the testator's intention appears.

This is a *house and stable*. They are given to the husband for life, *expressly*: so they are, to the brother. If she had meant the like to the children, she would have done the like. But she gives to the seven children, *after* the two lives, a *wasting* property, *share and share alike*. Besides, she directs the house and stable to be *divided* amongst the seven children, in case her brother dies before her husband: that is, they must be *sold*, and the produce divided.

We are of opinion, that, upon the *whole* of this will, there is enough to shew that the testatrix *intended* the *value* of this house and stable to be divided amongst the seven children.

The sweeping residuary clause does not alter the case: she does not dispose of all the money that she had to dispose of.

PLAINTIFF to be NONSUITED: and the  
POSTEA to be delivered to the DEFENDANT.

Armstrong, ex dimiss. Tinker et al. *versus* Peirse  
et al.

Trustees shall  
not recover pos-  
session from, or  
dispute it with  
their cestui que  
trust.

THIS was an action of trespass and ejectment of a mes-  
suage and lands at *Bishop's Canning* in *Wilts*; on the se-  
veral demises of *John Tinker, Joseph Tinker, Benjamin Harring,*  
and

and *James Bartlett*; *Robert Preston* and *Thomas Hunt*; and *Hester Pitman*. The cause came on to be tried at the last Lent Assizes for the county of *Wilts* before Mr. Justice *Astton*: when a general verdict was found for the plaintiff, subject to the opinion of this court upon the following

1766.

ARMSTRONG  
ex admist.  
TINKER & al.  
v. PEARSE & al.

Case—*Alice Rudman*, spinster, being legally possessed of the premises in question, for the residue of a term of 99 years, determinable upon the death of herself and two other persons; and a marriage being intended between her and *John Peirse*, yeoman; by indenture dated 21st December 1733, between the said *John* of the first part, the said *Alice* of the second part, and *Robert Tinker* and *William Harring* of the third part, the said *Alice Rudman* assigned to the said *Robert Tinker* and *William Harring* all the premises in question for the remainder of the said term of 99 years, determinable as aforesaid; upon trust for the said *Alice Rudman* and her assigns until the said intended marriage should be had; and from and immediately after, upon trust that they the said *Robert Tinker* and *William Harring* and the survivor of them his executors or administrators should permit and suffer the said *John Peirse* and his assigns to hold and enjoy the premises, and to take the rents and profits thereof during so long of the residue of the said term as the said *John Peirse* and *Alice Rudman* should jointly live; and if the said *Alice Rudman* should survive the said *John Peirse*, then after his death, in trust wholly for the said *Alice Rudman* her executors administrators and assigns, to her and their own use and benefit: and if the said *A. R.* should die in the life-time of the said *J. P.* then from and immediately after such her death, upon trust to permit and suffer such persons to hold and enjoy the same premises for the residue of the term, as she by any writing under her hand and seal &c, or by her last will and testament &c, should appoint.

The said marriage took effect.

The said *William Harring* died in 1733.

By indenture dated 29th September 1743, (which recited the former deed of settlement, and the trusts and limitations contained in it,) in consideration of the sum of 330*l.* paid to the said *John Peirse* and *Alice* his wife, the said *Robert Tinker* by the direction of *Peirse* and his wife, and also the said *John Peirse* and the said *Alice Peirse* assigned, and the said *Alice*, in pursuance of her power reserved to her, limited the premises in question to *Andrew Sealy* his executors administrators and assigns, for the remainder of the said term of 99 years,



1766.

ARMSTRONG  
ex dimiss.  
TINKER & al.  
v. PEIRSE & al.

years determinable as aforesaid with a proviso for redemption upon payment of the principal and interest upon the 25th of *March* then next ensuing. In this indenture is a covenant for further assuring the premises upon non-payment &c.

By indenture dated 18th *November* 1751, the said *John Peirse* and his wife, in consideration of 300 *l.* assigned over the premises in question to *Hester Pitman* her executors administrators and assigns for the remainder of the term determinable as aforesaid; with a like proviso for redemption, and covenant for further assurance as are abovementioned.

The said *John Peirse* paid all the interest due on the said several mortgages, to the last day of payment respectively before his death, which happened in 1758. His wife survived him, but paid no interest after his death, either to *Sealy* or *Pitman*, or to any other person on their behalf; nor was any interest ever demanded of her.

The said *Andrew Sealy* and *Robert Tinker* are since dead; and the fix first-named of the lessors of the plaintiff are, respectively, their legal representatives: viz. *John* and *Joseph Tinker*, *B. Harring*, and *James Bartlett*, are executors and legal representatives of *Robert Tinker*; and *Robert Preston* and *Thomas Hunt* are the executors and legal representatives of *Andrew Sealy*.

The said *Alice Peirse* continued in possession of the premises until her death, which happened in 1765; and, previous thereto, made her will dated 29 *July* 1759, whereby she devised the premises to the defendant her daughter in the following words—"I give unto my daughter *Alice Peirse* all that leasehold estate commonly called *Reise's*, which I now hold by virtue of a settlement made before marriage with my late husband."

The defendant *Peirse* is in possession of part of the premises in question; and the other defendants, of the residue, as her under-tenants.

The question submitted to the court was "Whether the plaintiff was intitled to recover the premises in this ejectment."

*Mr. Gould* argued this case for the plaintiff; *Mr. Thurlow*, for the defendants.

And the question they meant to make, was "Whether a mere trustee could dispute the possession of his own *cestui qui trust*."

But

But THE COURT, though they looked upon it as a settled point, "That the formal title of a trustee should not, in an ejectment, be set up against the *cestui qui trust*; because, "from the nature of the two rights, the *cestui qui trust* is to "have the possession;" yet in *this* case, that was *not* the question: for, here, the lessors of the plaintiff were not trustees for the defendant, but for the mortgagees.

And therefore they immediately gave judgment; and directed that the

POSTEA should be delivered to the PLAINTIFF.

### Rex versus Lookup.

Wednesday,  
7 May 1766.

ON the 30th of June 1762. in the second year of his present majesty, a bill was found against the defendant George Lookup, for wilful and corrupt perjury in his answers to a bill in chancery filed by Sir Thomas Frederick, relative to money charged to be unfairly won by the defendant at play.

Perjury being alledged in the indictment to have been committed in the time of the late king, and charged to be against the peace of the now king, is fatal, and renders the indictment insufficient, and a conviction therefore reversed in the house of lords and defendant discharged therefrom.

Upon this indictment, he was tried, and convicted.

He thereupon petitioned the king; and obtained a reference to Lord Mansfield; who chose to take the opinion of the judges. They received his affidavits, and examined into his reasons and insinuations. After which, they declared themselves thoroughly satisfied with the verdict; and saw no foundation for granting a new trial. Whereupon, they proceeded to his sentence: which was—"That he should be set "in and upon the pillory, at Charing-Cross, for an hour, "between the hours of twelve and two; and that he should "be afterwards transported to some of his majesty's colonies "or plantations in America, for the space of seven years; "and be now remanded to the custody of the marshal, to be "by him kept in safe custody, in execution of the judgment "aforesaid, and until he shall be transported as aforesaid."

On Wednesday 27th November 1765, (which was eight or nine days after the sentence had been pronounced,) he moved "To stay the entry of the judgment;" in order to give him an opportunity of moving in arrest of judgment; a fatal mistake having been since discovered; viz. "That the fact was charged to have been committed in the time of the late king," whereas the indictment concludes "Against the peace of the "present

1766.

ARMSTRONG  
ex dimiss.  
TINKER & al.  
v. PRINCE & al.



1766.

Rex v.  
Loonup.

"present king:" and his counsel urged, that he was *within time*; as the motion was made during the *same* term in which the sentence was pronounced, and the entry-roll of the record not yet made up.

But THE COURT denied this motion. They thought, that in *such* a case, and upon *such* an objection, they were not bound or warranted to let in a motion in arrest of judgment, after sentence pronounced.

His regular remedy was by writ of error.

The next day, the defendant's counsel moved to *adjourn* his standing in the pillory, on an affidavit (made by his physician) of his *illness*; and that his standing in the pillory, in the open air, for an hour, would probably *endanger his life*.

Note—The rule is drawn up, "That the marshal deliver the defendant to the sheriff; and that the sheriff do set him in and upon the pillory, for an hour, between the hours of ten and twelve, on [leaving the day in *blank*]; and then deliver him to the marshal &c." and this blank is afterwards filled up, at the choice and nomination of the *sheriff*. In the *present* case, it had been filled up with the words "Saturday next, the 30th instant;" and had been actually *delivered out* to the sheriff.

LORD MANSFIELD—Let the rule be altered thus—"That upon reading the former rule, and upon reading the affidavit of Dr. *Watson* concerning the present indisposition of the defendant, the time appointed by the said rule for setting the defendant in and upon the pillory is *enlarged*; and that the said sentence be executed *on the 17th day of December next, or as soon afterwards as the same can be done without danger* from the defendant's indisposition."

The next day (the last day of *Michaelmas* term 1765.)

*Eyre*, Recorder of *London*, on behalf of the defendant, urged the court (as he had before done, on the preceding day,) to *reconsider* their judgment, that is to say, their *sentence*; and he mentioned 1 *Salk.* 78. *The Queen* against *Darby*, and *Farrlesley* (7 *Mod.* 100. S. C. and 2 *Hale's Hist. P. C.* 379. where Lord Ch. J. *Hale* says, "If, by any mistake or oversight, the court should give judgment against a clerk convicted of a felony within clergy; yet they may, and (as I think) *ought* to allow him his clergy, *after* his attainder." From whence he argued, that as in the present case the judgment

ment ought to have been "*Quod cassetur*" it is not only in their power to set it right now, but they are even bound *ex officio* to do so. And he said, there was no distinction, in criminal cases, between *form* and *substance*.

1766.

Rex v.  
Looker.

But THE COURT persisted in not doing this, without some precedent. They said, the citation from *Hales's H. P. C.* was not parallel to the present case. There, the judgment would only be *corrected*: this is a motion to *arrest* it. That was a *capital* case too: here, you are limited to a time. And even in capital cases, you have no instance of such a motion as this, *after* the expiration of the limited time.

## MOTION DENIED.

Whereupon, Mr. *Looker* brought a writ of error returnable in parliament, and assigned several errors. 1st. That the indictment is insufficient. 2d. That the offence in the indictment specified is *not* charged to have been done against the peace of his *late* majesty: in whose reign it was alledged to have been committed. 3d. That the offence is charged to have been done against the peace of his *present* majesty; in whose reign it appears *not* to have been committed. 4th. That *no certain day or time* is fixed appointed or limited by the judgment, for setting the plaintiff in error in and upon the pillory. 5th. That *no certain time* is fixed appointed or limited by the judgment, for the transportation of the plaintiff in error. 6th. That the court of *king's bench* had not any power or authority, by law, to adjudge or order that the plaintiff should be transported to some of his majesty's \* colonies or plantations in *America* for the space of seven years.

\* V. 2 G. 2.  
c. 25.

All the objections were considered as frivolous; except that which was discovered after sentence pronounced. But

On 5th May 1766, the following question was put, by the lords, to the judges—

"Whether the perjury being alledged in the indictment to have been committed in the time of the *late king*, and charged to be against the peace of the *now king*, is *fatal*, and renders the indictment *insufficient*."

The Lord Chief Baron delivered the unanimous opinion of the judges, in the *affirmative*.

And



1766.

Rex v.  
LOOKUP.

And upon *this* point, the judgment of the *king's bench* was REVERSED.

Two days after, on 7th *May* 1766, Mr. Recorder moved, on his behalf, (but without his being brought up into court,) that he might be *discharged*.

And, the Order of reversal being produced and read,  
THE COURT ordered him to be

DISCHARGED.\*

\* V. post. 29th  
January, 1771.

It is very remarkable, that from *Michaelmas* term 1756, to the time of this publication (*Michaelmas* term 1771,) this is the only judgment of the court of *king's bench*, which has been reversed; though, from the importance and difficulty of the questions, there have been many writs of error in the exchequer-chamber and in parliament.

Friday, 9  
May 1766.

### Rex *versus* Helling et al'.

Order made on  
Easter Wednesday  
1766, appointing over-  
seers for the  
present year  
1766, is a good  
order.

MR. *Coxe* and Mr. *Dunning* shewed cause against quashing an order made upon *Easter Wednesday* 1766, by two justices (*Luke Robinson* and *Joseph Girdler Esqrs.*) appointing the defendants overseers of the poor of *St. Andrew's Holbourn* above the bars, and *St. George the Martyr*.

It has been objected, that this is not an appointment under the statute of 43 *Eliz. c. 2*, being "*For this present year 1766.*"

Answer—But this is the usual form in this parish. And the order says, "And to do *all* such things as their duty requires;" that is, (amongst other things) to stay in their office till others are appointed.

Sir *Fletcher Norton* and Mr. *Walker*, *contra*, argued for quashing the order.

They admitted, they could not go out of the order. But by 43 *Eliz. c. 2. sect. 1.* the overseers are to be nominated yearly, and this act giving a jurisdiction, they are obliged to conform exactly to it. Consequently, they can nominate only FOR A YEAR; (neither more nor less.)

Whereas this appointment being made on *Easter Wednesday*, and appointing them for the year 1766, they were not obliged  
nor

nor authorized or intitled to continue any longer than the *end of the year 1766*. It is *not* an appointment for a year.

1766.

REV.

HELLING & al.

Lord MANSFIELD—The *real* objections, I take it for granted, are not before the court.

The only question *before us* is “Whether the order is good upon the *face of it*, or not.”

Now this order plainly means the *overseer's* year: and *that* year is from *Easter 1765* to *Easter 1766*: You would make it bad, by understanding it to mean the year of our Lord. But you can not construe this order to be a bad one, by understanding it *so*: for it manifestly means *quite another sort* of year.

Mr. Justice WILMOT was silent, being a parishioner.

Mr. Justice YATES was absent.

Mr. Justice ASTON concurred with Lord *Mansfield*; and said, that if the construction may be taken two ways; one of them making the order good, the other making it bad; he should take it in the sense that would make it *good*. Wherefore

*Per Cur.*—

RULE DISCHARGED :

ORDER AFFIRMED.

*Rex versus* Inhabitants of Ecclefall Bierlow in  
Sheffield.

Monday, 12  
May 1766.

(1 Black. Rep.  
592. S. C.)

See this *Case* ABRIDGED, in the Table; and *at large* in the  
Quarto-Edition of my SETTLEMENT-CASES, No. 180.  
Pa. 562.

*Carter versus* Boehm.

**T**HIS was an insurance-cause, upon a policy underwritten by Mr. *Charles Boehm*, of interest, or no interest; without benefit of salvage. The insurance was made by the plaintiff, for the benefit of his brother, Governor *George Carter*.

What degree of concealment, will avoid a policy of insurance.

It



1766.

CARTER v.  
BOZEM.

It was tried before Lord *Mansfield* at *Guildhall*: and a verdict was found for the plaintiff by a special jury of merchants.

On *Saturday* the 19th of *April* last, Mr. Recorder (*Eyre*,) on behalf of the defendant, moved for a new trial.

His objection was, "That circumstances were not sufficiently disclosed."

A rule was made to shew cause: and copies of letters and depositions were ordered to be left with Lord *Mansfield*.

N. B. Four other causes depended upon this.

The counsel for the plaintiff, viz. Mr. *Morton*, Mr. *Dunning* and Mr. *Wallace*, shewed cause on *Thursday* the first of this month. But first,

Lord MANSFIELD reported the evidence---That it was an action on a policy of insurance for one year; viz. from 16th of *October* 1759 to 16th of *October* 1760, for the benefit of the Governor of *Fort Marlborough*, *George Carter*, against the loss of *Fort Marlborough* in the island of *Sumatra* in the *East Indies*, by its being taken by a foreign enemy. The event happened: the fort was taken, by Count *D'Estaigne*, within the year.

The first witness was *Cawthorne*, the policy-broker, who produced the memorandum given by the governor's brother (the plaintiff) to him: and the use made of these instructions was, to shew "That the insurance was made for the benefit of Governor *Carter*, and to insure him against the taking of the fort by a foreign enemy."

Both sides had been long in chancery: and the chancery-evidence on both sides was read at the trial.

It was objected, on behalf of the defendant, to be a fraud, by concealment of circumstances which ought to have been disclosed; and particularly, the weakness of the fort, and the probability of its being attacked by the *French*: which concealment was offered to be proved by two letters. The first was a letter from the governor to his brother *Roger Carter*, his trustee, the plaintiff in this cause: the second was from the governor to the *East India Company*.

The

The evidence in reply to this objection consisted of three depositions in chancery, setting forth that the governor had 20000 *l.* in effects; and only insured 10000 *l.*; and that he was guilty of *no fault* in defending the fort.

1766.

CARTER v.  
BOZEM.

The first of these depositions was Captain Tryon's: which proved that this was not a fort proper or designed to resist *European* enemies; but only calculated for defence against the *natives* of the island of *Sumatra*; and also that the governor's office is *not military*, but only *mercantile*; and that fort *Marlborough* is only a subordinate factory to fort *St. George*.

There was no evidence to the contrary. And a verdict was found for the plaintiff, by a special jury.

After his lordship had made his report,—

The counsel for the plaintiff proceeded to shew cause against a new trial.

They argued that there was *no such concealment* of circumstances (as the weakness of the fort, or the probability of the attack,) as would amount to a fraud sufficient to *vitiare* this contract: all which circumstances were *universally known* to every merchant upon the exchange of *London*. And all these circumstances, they said, were fully considered by a special jury of merchants, who are the proper judges of them.

And Mr. *Dunning* laid it down as a rule—"That the insured is only obliged to discover *facts*; not the *ideas* or *speculations* which he may entertain, upon such facts."

They said, this insurance was, in reality, no more than a wager; "Whether the *French* would think it their interest to attack this fort; and if they should, whether they would be able to get a ship of war up the river, or not."

Sir *Fletcher Norton* and Mr. Recorder (*Eyre*) argued, *contra*, for the defendant (the under-writer.)

They insisted, that the insurer has a right to know *as much* as the insured himself knows.

They alledged too, that the *broker* is the sole agent of the insured.



1766.

CARTER V.  
BOURN.

*These are general, universal principles, in all insurances.*

Then they proceeded to argue in support of the present objection.

The broker had, they said, on being cross-examined, owned that he did *not* believe that the insurer would have meddled with the insurance, *if* he had seen these two letters.

*All the circumstances ought to be disclosed.*

This wager is not only "Whether the fort shall be *attacked*;" but "Whether it shall be attacked *AND taken*."

*Whatever really increases the risque ought to be disclosed.*

Then they entered into the particulars which had been here kept concealed. And they insisted strongly, that the plaintiff ought to have discovered the weakness and absolute *indefensibility* of the fort. In *this* case, *as against the insurer*, he was obliged to make such discovery; though he acted for the *governor*. Indeed, a governor ought not, in point of policy, to be permitted to insure *at all*: but if he is *permitted* to insure, or will insure, he ought to disclose all *facts*.

It can not be supposed that the insurer would have insured so low as 4*l. per cent*, if he had known of these letters.

It is begging the question, to say, "That a fort is not intended for defence against an enemy." The supposition is absurd and ridiculous. It must be presumed that it was intended for that purpose: and the *presumption* was "That the fort, the powder, the guns &c. were in a *good and proper condition*." If they were not, (and it is agreed that in fact they *were not*, and that the governor *knew* it,) it ought to have been *disclosed*. But if he had disclosed this, he could not have got the insurance. Therefore this was a fraudulent concealment: and the underwriter is not liable.

It does not follow, that because he did not insure his *whole* property; therefore it is good for what he *has* judged proper to insure. He might have his reasons for insuring only a part, and not the whole.

*Cui. advisare vult.*

Lord

Lord MANSFIELD now delivered the resolution of the court.

1766.

CARTER v.  
BOLENN.

THIS is a motion for a new trial.

In support of it, the counsel for the defendant contend,  
“ That some circumstances in the knowledge of Governor  
“ *Carter*, not having been mentioned at the time the policy  
“ was underwrote, amount to a *concealment*, which ought,  
“ in law to *avoid* the policy.”

The counsel for the plaintiff insist, “ That the not men-  
“ tioning these particulars, does *not* amount to a concealment,  
“ which ought, in law, to avoid the policy; either as a  
“ *fraud*; or, as *varying* the contract.”

1st. It may be proper to say something, in general, of *con-  
cealments which avoid a policy*.

2dly. To state particularly the case *now* under considera-  
tion.

3dly. To examine whether the *verdict*, which finds this  
policy good although the particulars objected were not men-  
tioned, is *well founded*.

First. Insurance is a contract upon speculation.

The special facts, upon which the contingent chance is to  
be computed, lie most commonly in the knowledge of the  
*insured* only: the under-writer trusts to his representation,  
and proceeds upon confidence that he does not keep back any  
circumstance in his knowledge, to mislead the under-writer  
into a belief that the circumstance does not exist, and to in-  
duce him to estimate the risk, as if it did not exist.

The keeping back such circumstance is a *fraud*, and there-  
fore the policy is *void*. Although the suppression should hap-  
pen through *mistake*, without any fraudulent intention; yet  
still the under-writer is *deceived*, and the policy is *void*; be-  
cause the risk run is really different from the risk under-  
stood and intended to be run, at the time of the agreement.

The policy would equally be void, against the *under-writer*,  
if *he* concealed; as, if he insured a ship on her voyage,  
which he privately knew to be arrived: and an action would  
lie to recover the premium.



1766.

CARTER V.  
BOEHM.

The governing principle is applicable to *all* contracts and dealings.

Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.

But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon. *Aliud est celare; aliud, tacere: neque enim id est celare quicquid reticeas; sed cum quod tu scias, id ignorare emolumenti tui causa velis eos, quorum interfit id scire.*

This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his ignorance of the thing concealed.

There are many matters, as to which the insured may be innocently silent—he need not mention what the under-writer knows—*scientia utrinque par pares contrabentes facit.*

An under-writer can not insist that the policy is void, because the insured did not tell him what he actually knew; what way soever he came to the knowledge.

The insured need not mention what the under-writer *ought to know*; what he takes upon himself the knowledge of; or what he *waves* being informed of.

The under-writer needs not be told what lessens the risk agreed and understood to be run by the express terms of the policy. He needs not be told general topics of speculation: as for instance—the under-writer is bound to know every cause which may occasion natural perils; as, the difficulty of the voyage—the kind of seasons—the probability of light'ning, hurricanes, earthquakes &c. He is bound to know every cause which may occasion political perils; from the ruptures of states; from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecillity of the enemy, through the weakness of their councils, or their want of strength &c.

If an under-writer insures private ships of war, by sea and on shore, from ports to ports, and places to places, any where—he needs not be told the secret enterprizes they are destined

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upon; because he knows some expedition must be in view; and, from the nature of his contract, without being told, he waves the information. If he insures for three years, he needs not be told any circumstance to shew it may be over in two: or if he insures a voyage, with liberty of deviation, he needs not be told what tends to shew there will be no deviation.

1766.

CARTER v.  
BENM.

Men argue differently, from natural phenomena, and political appearances: they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both: each professes to act from his own skill and sagacity; and therefore neither needs to communicate to the other.

The *reason* of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to *such* facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect.

The question therefore must always be "Whether there was, under all the circumstances at the time the policy was under-written, a *fair representation*; or a *concealment*; fraudulent, if *designed*; or, though not designed, *varying materially the object* of the policy, and *changing the risque* understood to be run."

This brings me, in the second place, to state the case now *Secondly*. under consideration.

The policy is against the loss of Fort *Marlborough*, from being destroyed by, taken by, or surrendered unto, any *European* enemy, between the 1st of *October* 1759, and 1st of *October* 1760. It was under-written on the 9th of *May* 1760.

The under-writer knew at the time, that the policy was to indemnify, to that amount, *Roger Carter* the Governor of Fort *Marlborough*, in case the event insured against should happen. The governor's instructions for the insurance, bearing date at Fort *Marlborough* the 22d of *September* 1759, were laid before the under-writer. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the *East India* Company, which the company offered to put into my hands; but would not deliver to the parties, because it contained some matters which they did not think proper to be made public.



1766.

CARTER V.  
BOEHM.

An objection occurred to me at the trial, "Whether a policy against the loss of Fort *Marlborough*, for the benefit of the governor, was good;" upon the principle which does not allow a sailor to insure his wages,

But considering that this place, though called a fort, was really but a factory or settlement for trade; and that he, though called a governor, was really but a merchant—considering too, that the law allows the captain of a ship to insure goods which he has on board, or his share in the ship, if he be a part-owner; and the captain of a privateer, if he be a part-owner, to insure his share—considering too, that the objection did not lie, upon any ground of justice, in the mouth of the under-writer, who knew him to be the governor, at the time he took the premium.—And as, with regard to principles of public convenience, the case so seldom happens, (I never saw one before,) any danger from the example is little to be apprehended—I did not think myself warranted, upon that point, to nonsuit the plaintiff; especially too, as the objection did not come from the bar,

Though this point was mentioned, it was not insisted upon, at the last trial; nor has it been seriously argued, upon this motion, as sufficient, alone, to vacate the policy: and if it had, we are all of opinion "That we are not warranted to say it is void, upon this account."

Upon the plaintiff's obtaining these two verdicts, the underwriters went into a court of equity; where they have had an opportunity to sift every thing to the bottom, to get every discovery from the governor and his brother, and to examine any witnesses who were upon the spot. At last, after the fullest investigation of every kind, the present action came on to be tried at the sittings after last term,

The plaintiff proved, without contradiction, that the place called *Bencoolen* or Fort *Marlborough* is a factory or settlement, but no military fort or fortress. That it was not established for a place of arms or defence against the attacks of an *European* enemy; but merely for the purpose of trade, and of defence against the natives. That the fort was only intended and built with an intent to keep off the country blacks. That the only security against *European* ships of war, consisted in the difficulty of the entrance and navigation of the river, for want of proper pilots. That the general state and condition of the said fort, and of the strength thereof, was, in general well known

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known by most persons conversant or acquainted with *Indian* affairs, or the state of the company's factories or settlements; and could not be kept secret or concealed from persons who should endeavour by proper inquiry, to inform themselves. That there were no apprehensions or intelligence of any attack by the *French*, until they attacked *Nattal* in Feb. 1760. That on the 8th of *February* 1760, there was no suspicion of any design by the *French*. That the governor then bought, from the witness, goods to the value of 4000*l.* and had goods to the value of above 20000*l.* and then dealt for 50000*l.* and upwards. That on the 1st of *April* 1760, the fort was attacked by a *French* man of war of 64 guns and a frigate of 20 guns, under the count *D'Estaigne*, brought in by *Dutch* pilots; unavoidably taken; and afterwards delivered to the *Dutch*; and the prisoners sent to *Batavia*.

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BOHM.

On the part of the defendant—After all the opportunities of inquiry, no evidence was offered, that the *French* ever had any design upon Fort *Morlborough*, before the end of *March* 1760; or that there was the least intelligence or alarm "That they might make the attempt," till the taking of *Nattal* in the year 1760.

They did not offer to disprove the evidence, that the governor had acted, as in full security, long after the month of *September* 1759; and had turned his money into goods, so late as the 8th of *February* 1760. There was no attempt to shew that he had not lost by the capture very considerably beyond the value of the insurance.

But the defendant relied upon a letter, written to the *East India* Company, bearing date the 16th of *September* 1759, which was sent to *England* by the *Pitt*, captain *Wilson*, who arrived in *May* 1760, together with the instructions for insuring; and also a letter bearing date the 22d of *September* 1759, sent to the plaintiff by the same conveyance, and at the same time, (which letters his lordship repeated.\*)

\* The former  
of them notifies

to the *East India* Company, That the *French* had, the preceding year, a design on foot, to attempt taking that settlement by surprise; and that it was very probable they might revive that design. It confesses and represents the weakness of the fort; its being badly supplied with stores arms and ammunition; and the impracticability of maintaining it (in its then state) against an *European* enemy.

The latter letter (to his brother) owns that he is "now more afraid than formerly, that the *French* should attack and take the settlement; for, as they can not muster a force to relieve "their friends at the coast, they may, rather than remain idle, pay us a visit. It seems, they "had such an intention, last year." And therefore he desires his brother to get an insurance made upon his stock there.

They relied too upon the cross-examination of the broker who negotiated the policy, "That, in his opinion, these

X x 4

" letters



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" letters ought to have been shewn, or the contents disclosed; and if they had, the policy would not have been under-written."

The defendant's counsel contended at the trial, as they have done upon this motion, "That the policy was void."—

1st. Because the *state and condition of the fort*, mentioned in the governor's letter to the *East India Company*, was not disclosed.

2dly. Because he did not disclose, that the *French*, not being in a condition to relieve their friends upon the coast, were more likely to make an attack upon this settlement, rather than remain idle.

3dly. That he had not disclosed his having received a letter of the 4th of *February* 1759, from which it seemed that the *French* had a design to take this settlement, by surprise, the year before.

They also contended, that the opinion of the broker was almost decisive.

The whole was laid before the jury; who found for the plaintiff.

Thirdly.

Thirdly—It remains to consider these objections, and to examine "Whether this verdict is well founded."

To this purpose, it is necessary to consider the nature of the contract, at the time it was entered into.

The policy was signed in *May* 1760. The contingency was, "Whether fort *Marlborough* was or would be taken, by an *European* enemy, between *October* 1759, and *October* 1760."

The computation of the risk depended upon the chance, "Whether any *European* power would attack the place by sea." If they did, it was incapable of resistance.

The under-writer at *London*, in *May* 1760, could judge much better of the probability of the contingency, than governor *Carter* could at *Fort Marlborough*, in *September* 1759. He knew the success of the operations of the war in *Europe*. He knew what naval force the *English* and *French* had sent to the *East Indies*. He knew, from a comparison of that force, whether the sea was open to any such attempt by the *French*. He knew, or might know, every thing which was known at *Fort Marlborough* in *September* 1759, of the general state of affairs

affairs in the *East Indies*, or the particular condition of Fort *Marlborough*, by the ship which brought the orders for the insurance. He knew that ship must have brought many letters to the *East India Company*; and, particularly, from the governor. He knew what probability there was of the *Dutch* committing or having committed hostilities.

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BOHEM.

UNDER these circumstances, and *with* this knowledge, he insures against the general contingency of the place being attacked by an *European* power.

If there had been any design *on foot*, or any enterprize begun, in *September* 1759, to the knowledge of the governor, it would have varied the risque understood by the under-writer; because, not being told of a particular design or attack *then subsisting*, he estimated the risque upon the foot of an *incertain* operation, which might or might not be attempted.

But the governor had no notice of any design *subsisting* in *Sept.* 1759. There was no such design, in fact: the attempt was made without premeditation, from the sudden opportunity of a favourable occasion, by the connivance and assistance of the *Dutch*, which tempted count *D'Estaing* to break his parole.

These being the circumstances under which the contract was entered into, we shall be better able to judge of the objections upon the foot of *concealment*.

The first concealment is, that he did not disclose the *condition of the place*.

The under-writer knew the insurance was for the governor. He knew the governor must be acquainted with the state of the place. He knew the governor could not disclose it, consistent with his duty. He knew the governor, by insuring, apprehended at least the possibility of an attack. *With* this knowledge, *without* asking a question, he under-wrote.

By so doing, he took the knowledge of the state of the place *upon himself*. It was a matter as to which he *might be informed*, various ways: it was not a matter within the private knowledge of the governor only.

But, not to rely upon that—The utmost which can be contended is, that the under-writer trusted to the fort being in the condition in which it *ought* to be: in like manner, as it is taken for granted, that a ship insured is sea-worthy.

What



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CARTER v.  
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What is that condition? all the witnesses agree "That it was only to resist the *natives*, and not an *European* force." The policy insures against a total loss; taking for granted "That if the place was attacked, it would be lost."

The contingency therefore which the under-writer has insured against is, "Whether the place would be attacked by an *European* force;" and not, "Whether it would be able to resist such an attack, if the ships could get up the river."

It was particularly left to the jury, to consider, "Whether this was the contingency in the contemplation of the parties:" they have found that it was.

And we are all of opinion, "That, in this respect, their conclusion is agreeable to the evidence."

In this view, the state and condition of the place was material, only in case of a land-attack by the *natives*.

The 2d concealment is—His not having disclosed, that, from the *French* not being able to relieve their friends upon the coast, they might make them a visit.

This is no part of the fact of the case: it is mere speculation of the governor's from the general state of the war. The conjecture was dictated to him from his fears. It is a bold attempt, for the conquered to attack the conqueror, in his own dominions. The practicability of it, in this case, depended upon the *English* naval force in those seas; which the under-writer could better judge of at *London* in *May* 1760, than the governor could at *Fort Malborough* in *September* 1759.

The 3d concealment is—That he did not disclose the letter from *Mr. Winch*, of the 4th of *February* 1759, mentioning the design of the *French*, the year before.

What the letter was; how he mentioned the design, or upon what authority he mentioned it; or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery; and nothing has come out upon it, as to this letter, which he thinks makes for his purpose.

The plaintiff offered to read the account *Winch* wrote to the *East India* Company: which was objected to; and there-

fore not read. The nature of that intelligence therefore is very doubtful. But taking it in the strongest light, it is a report of a design to surprize, the year before; but *then* *decept.*

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This is a topic of mere *general speculation*; which made no part of the *fact* of the case upon which the insurance was to be made.

It was said—If a man insured a ship, knowing that two privateers were lying in her way, without mentioning that circumstance, it would be a fraud—I agree it. But if he knew that two privateers had been there the year before, it would be no fraud, not to mention *that* circumstance: because, it does not follow that they will cruise *this* year at the same time, in the same place: or that they are in a condition to do it. If the circumstance of “this design laid aside” had been mentioned, it would have tended rather to lessen the risque, than increase it: for, the design of a surprize which has transpired, and been laid aside, is *less* likely to be taken up again; especially, by a vanquished enemy.

The jury considered the nature of the governor’s silence, as to these particulars: they thought it innocent; and that omission to mention them did *not* vary the contract. And we are all of opinion, “That, in this respect, they judged extremely right.”

There is a silence, not objected to at the trial nor upon this motion; which might with as much reason have been objected to, as the two last omissions; rather more.

It appears by the governor’s \* letter to the plaintiff, \* Dated 22d  
“That he was principally apprehensive of a † Dutch war.” Sept. 1759.  
He certainly had, what he thought, good grounds for this † His words  
apprehension. Count D’Estaigne being piloted by the Dutch, are—“And in  
delivering the fort to the Dutch, and sending the prisoners to “case of a  
Batavia, is a confirmation of those grounds. And probably, “Dutch war, I  
the loss of the place was owing to the Dutch. The French “would have  
could not have got up the river without Dutch pilots: and it “it [the insu-  
is plain, the whole was concerted with them. And yet, at “rance] done  
the time of under-writing the policy, there was no intimation “at any rate.”  
about the Dutch.

The reason why the counsel have not objected to his not disclosing the grounds of this apprehension, is, because it must have arisen from *political speculation*, and *general intelligence*;



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gence : therefore, they agree, it is *not* necessary to communicate *such* things to an under-writer.

Lastly—Great stress was laid upon the *opinion of the broker*.

But we all think, the jury ought not to pay the least regard to it. It is mere *opinion* ; which is not evidence. It is *opinion after* an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause : and therefore it is improper and irrelevant in the mouth of a witness.

There is no imputation upon the governor, as to any intention of *fraud*. By the same conveyance, which brought his orders to insure, he wrote to the company every thing which he knew or suspected : he desired nothing to be kept a secret, which he wrote either to them or his brother. His subsequent conduct, down to the 8th of *February* 1760, shewed that he thought the danger very *improbable*.

The *reason* of the rule against concealments is, to *prevent fraud and encourage good faith*.

If the defendant's objections were to prevail, in the present case, the rule would be *turned* into an *instrument of fraud*.

The under-writer, here, knowing the governor to be acquainted with the state of the place ; knowing that he apprehended danger, and must have some ground for his apprehension ; being told nothing of either ; signed this policy, *without asking a question*.

If the objection " That he was *not told*" is sufficient to vacate it, he took the *premium*, knowing the policy to be *void* ; in order to *gain*, if the alternative turned out *one way* ; and to make *no satisfaction*, if it turned out *the other* : he drew the governor into a *false confidence*, " That, if the worst should happen, he *had provided against* total ruin ;" knowing, at the same time, " That the indemnity to which the governor trusted, was *void*."

There was not a word said to him, of the affairs of *India*, or the state of the war there, or the condition of Fort *Marlborough*. If he thought that omission an objection, *at the time*, he ought not to have signed the policy, with a *secret reserve*

*reserve* in his own mind to make it void: IF he *dispensed* with the information, and did *not* think this silence an objection then; he can not take it up *now*, after the event.

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BOERN.

What has often been said of the statute of frauds may, with more propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud—"That it should never be so turned, construed, or used, as to protect, or be a means of fraud."

After the fullest deliberation, we are all clear that the verdict is well founded; and there ought not to be a new trial: consequently, that the rule for that purpose ought to be discharged.

RULE DISCHARGED.

The End of Easter Term 1766. 6 G. 3.



## Trinity Term

6 Geo. 3. B. R. 1766.

### *Rex versus* Inhabitants of Frome Selwood.

See this *Case* ABRIDGED, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, No. 181. P. 565.

### *Campbell versus* Daley.

Tuesday, 17  
June 1766.

Special bail must be put in, upon appearing to an outlawry, where special bail was originally required.

THE question was, "Whether, in a case *originally* requiring special bail, and the defendant standing out to an outlawry, he can come in and appear to the outlawry *without* putting in SPECIAL bail."

See the stat. of 31 *Eliz. c. 3. § 3*; and 4, 5 *W. & M. c. 18. § 4*.

*Per Cur.*—There ought to be *special* bail: it would be very unreasonable, that the defendant should gain an *advantage*, by standing out till process of outlawry. He certainly ought not to be in a *better* case then, than if he had appeared at first. And accordingly, the direction given was "That the filacer should not issue a *supersedeas*, till the defendant had put in *special* bail." And a week was given him, for that purpose.

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*Rex versus Inhabitants of Ilmington.*

Wednesday 18  
June 1766.

See this *Cafe* ABRIDGED, in the Table; and *at large*, in the (1 Black. Rep. 598. S. C.)  
Quarto-edition of my SETTLEMENT-CASES, No. 182.  
P. 566.

*Regula generalis.*

FOR the future, the sheriffs of *London* and *Middlesex*, who before could not be compelled to return their writs and bring in the body, till after *six* days, shall be obliged to do it *within* FOUR DAYS. Sheriffs to re-  
turn their writs  
within four days.

*Simon versus Motivos.*

(1 Black. Rep.  
599. S. C.)

THIS action was brought against the defendant, who had bought goods at an auction, which were not taken away according to the conditions of sale, but put up again and resold. Auctions seem  
not to be within  
the statute of  
frauds.

There was a verdict for the plaintiff: and the defendant moved for a new trial.

The defendant was a broker; and bid for one *Durant*; but did not name his principal, till some days after.

The auctioneer, when he knocked down the lots to the highest bidder, put down his name, in the usual manner, as the purchaser of those goods. The defendant came, the next day, and saw the goods weighed.

The objection now made was, "That this contract, *not being in writing*, was void by the statute of frauds."

But THE COURT were, all, clearly of opinion, that the auctioneer must be considered as agent for the *buyer* (after knocking down the hammer,) as well as for the *seller*; and that his setting down in writing, the name of the buyer, the price &c, was sufficient to take it out of the statute; and that the buyer's coming the next day, and seeing the goods



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SIMON V.  
MOTIVOL.

goods weighed, was an additional circumstance, that deserved attention. And they inclined to think "That buying and selling at auctions was *not* within the statute of frauds."

Upon the whole, (though *no earnest* was actually paid,) they DISCHARGED the RULE which had been made upon the plaintiff, for him to shew cause why the verdict which he had obtained against the buyer should not be set aside, and why there should not be a new trial.

Rex *versus* Honourable Peter Mackenzie.

Husband's recognizance upon articles of the peace being exhibited against him by his wife, discharged, the appearing to be insane.

THIS gentleman's wife having sworn articles of the peace against him and others; and it having appeared fully to the court, as well upon some collateral motions, as upon his own affidavit now produced, "That he had never used any force against her, any otherwise than what was necessary to the care and cure of her as a person disordered in her mind; and *this* too, in pursuance of Dr. Battie's advice; and that he had never, in any other respect, treated her with any sort of ill usage, but quite the contrary."

\* V. ante, p. 306. Rex v. Robert Parnell, S. P. accorde.

THE COURT ordered his recognizance to be discharged, and that all proceedings against him be stayed.\*

Catchside, Widow and Administratrix &c, *versus* Ovington.

Spiritual court hath not jurisdiction to decide on inventory.

† V. 1 Mod. Cases, p. 168.

Hinton v. Par-

her-- "That the spiritual court can't falsify an inventory, at the suit of a creditor." Also, Bewick executrix of Bewick, v. Ord. H. 1742. 16 G. 2. B. R.

ON the last day of the last *Easter* term, Mr. Wallace, by leave obtained the day before, "To move it then," made a motion for a prohibition to an ecclesiastical court, on behalf of Mrs. Catchside the administratrix.†

The case was this—

Mrs. Catchside, the widow and administratrix, was cited into an inferior ecclesiastical court, at the promotion of Anne Ovington a creditor, "To exhibit an inventory." She brought one in: and the creditor objected to it. There was a decree for the creditor. The administratrix appealed to the superior ecclesiastical court: who affirmed the decree of the inferior ecclesiastical court. Her suggestion was, their want of jurisdiction.

Mr.

Mr. *Walker* now shewed cause against the prohibition.

1766.

His cause was—That this is *after sentence*: and therefore they come too late; unless they can shew that the spiritual court have determined contrary to law.

CATCHSIDE v.  
OVINGTON.

Lord MANSFIELD—It appears upon the face of the proceedings, “That the spiritual court have \* *no jurisdiction*.” Therefore the rule must be made absolute.

\* V. 21 H. 2.  
c. 5. § 4. which  
only requires the

executors or administrators to take such an inventory, and to deliver it into the keeping of the bishop or other person having authority to take probate of wills.

To which, the other judges agreed.

RULE MADE ABSOLUTE,  
for a prohibition.

### Walton, Assignee *versus* Bent.

IT was agreed by court and counsel, now, (and was so likewise, a few days ago,)

Action upon  
bail bond must  
be brought in  
same court,  
where bail was  
given.

That an *action upon a bail-bond* must be brought in the SAME court where the bail was given; and that this is now the settled practice.†

† V. ante, vol.  
I p. 622,  
Chefferton v.  
Middlehurst, S.  
P. accord.

Therefore, in the present case, the proceedings in *this* court were stayed; the bail-bond upon which this action was brought, having been given upon a process out of the common pleas.

RULE to stay PROCEEDINGS here.

The End of Trinity Term 1766. 6 G. 3.



1043

Trinity Term 6 Geo. 3 R. F.

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# A T A B L E OF THE P R I N C I P A L M A T T E R S

Contained in *this* Volume.

## Acceptance

**O**F a bill of exchange—In what manner, a bill may be accepted; what shall amount to an acceptance; and what sort of acceptance, or agreement “to accept,” shall be binding. Page 1663 to 1675. See *Bill of Exchange*.

## Act of God.

A Ship under repair by a shipwright, in a dock belonging to the shipwright, but for the use of which dock the owner of the ship was to pay him 5 l. was burnt, by a fire communicated from land, before the repairs were fully completed: the shipwright shall maintain his action for work, labour, and materials. 1592 to 1595.

## Action

On the case, by a master, against the seducer of his article-servant, bound, under a PENALTY, to serve him five years; which penalty the master had recovered in an action of debt brought

by him against the servant, before he commenced this action against the seducer; but the debt and costs so recovered were NOT ACTUALLY PAID to him till after the commencement, though before the trial of it: the master can not proceed in an action against any other person, AFTER having received from the SERVANT an ample satisfaction for the injury done him. Page 1345 to 1354.

1st. Whether he could have recovered in an action commenced against the seducer, after having only recovered, but not actually received the penalty from the servant—was not now determined: But Lord Mansfield said, He should have doubted of it extremely. 1353, 1354.

2dly. But after actual receipt of it, the court would have, even upon motion, stayed his proceeding further. 1354.

3dly. Upon articles with a PENALTY, the party injured may proceed toties quoties, for partial damages upon partial breaches: But he can not repeat the rigorous remedy of proceeding for the penalty;



## A Table of the Principal Matters.

penalty; because the penalty extends to all that he can be intitled to for every breach, and puts a total end to the contract between the parties. Page 1352.

4thly. There is no analogy between cases of joint-trespases and joint contracts, and the present case; and there is an essential difference between actions *stricti juris*, and actions upon the case—The latter are in the nature of bills in equity: And whatever will in equity bar the plaintiff's recovery may, in this action, be given in evidence; because the plaintiff must recover upon the justice and conscience of his case, and upon that only. 1353.

Upon the case, for money had and received to the plaintiff's use, will not lie, where a forged bill of exchange has been accepted and paid by the drawee, to an innocent indorsee. 1355 to 1357.

See Bill of Exchange.

Upon the case lies for maliciously suing out a commission of bankruptcy. 1418, 1419. See Bankrupt.

Of debt upon a prior judgment—is generally oppressive; though, in some particular cases, to be fairly accounted for. 1549.

The distinction between actions of trespass *vi et armis*, and of trespass upon the case. 1556 to 1564.

1st. Where the act is only consequentially injurious to the plaintiff, case is proper. *ibid.*

2dly. Where an immediate injury is done to the plaintiff's possession, trespass is the proper action. *ibid.*

3dly. In such action of trespass, if there be a doubt about the extent of the possession, or what part the plaintiff is in possession of, a writing may be given in evidence, to ascertain it. 1563.

4thly. If such writing be a lease, it cannot be given in evidence without being stamped. *ibid.*

Lies for a shipwright, for work and labour done, and materials delivered, in repairing a ship; though the ship was burnt in the dock, by a fire commu-

nicated from land, just before the repairs were completed. The dock belonged to the shipwright: but the owner of the ship had agreed to pay him 5 l. for the use of it. Page 1592 to 1595.

For words. 1688, 1689. See Words, Costs.

For a fine upon the admission of an infant copyholder. 1719, 1720. See Infant.

An alien enemy may maintain an action upon a ransom bill. 1741. See Alien.

Trespass *vi et armis* will lie, wherever there is an exclusive right. 1826, 1827.

1st. As an exclusive right to dig turf in a certain moss in a waste. *ibid.*

2d. So, a right to a sole and separate pasture for a time. *ibid.*

3d. But not for a right in common with others. *ibid.*

By a master, for beating his servant; or by a father for beating his child; will not lie, unless it be added—"per quod servitium amisit." 1879 to 1881.

By a father, for assaulting his daughter, being 23 years old, and then in the service of another person; and getting her with child; "per quod the father servitium amisit." The fact proved was, that she was gotten with child by the defendant during her service abroad; and becoming unable to perform it, was discharged by her master; and was received by her father, out of necessity; and lodged boarded and maintained by him in his own house, both before and after her lying-in.

The father can't maintain this action. *ibid.*

Against an owner of tithes—for not taking them away. 1891 to 1894. See Tithes.

Upon a bail-bond—must be brought in the same court where the bail was given.

Of debt, for an amercement in a court-leet. 1859 to 1865.

As

Ministerial—Judicial—It is not every act where the judgment is at all exercised, that

## A Table of the Principal Matters.

that is a judicial act: A judicial act is done *pendente lite* (of some kind or other) Page 1262.

*Billeting soldiers* is a ministerial act. *ibid.*

**Administratoꝝ.** See. *Executor.*

**Abolition.**

Grant of an *advowson* or *next presentation*, made after the church is actually fallen vacant, is a void grant, quoad the actual vacancy. 1510.

The true reason why such a grant is not good, is the public utility, and to guard the better against *simony*; not for the *fictional reason* (given in the old books) of its being a chose in action. 1512.

**Ad dabit.**

To hold to *special bail*—must be positive.

1447. *V. ante*, 655. See *Bail*.

To hold to *special bail*, on 26 G. 2. c. 21. § 8. 1569. See *Bail*.

To hold to *special bail* must be positive; and not by way of reference only. 1687. *V. ante*, 655, 1032, 1447. See *Bail*.

**Alien.**

An alien enemy (the captain of a French privateer) took an English ship, upon the high seas, in time of open war; and ransomed the ship and cargo for 300 pistoles; and had the mate given to him as a *hostage*; which *hostage* died in prison. The ransom-bill was signed by both captains, and by the *hostage*: and by it, the English captain obliges himself and his owners to pay the French captain 300 pistoles, within two months. An action is maintainable by the French captain against the English captain, upon this ransom-bill; notwithstanding the death of the *hostage*, and the plaintiff's being an alien enemy. 1741. And the like

law prevails in France, and in Holland. Page 1741.

**Ambassador.**

Domestic servants of ambassadors or other public ministers are privileged from arrests, seizures, &c, by 7 Ann. c. 12.

1st. An actual *bonâ fide* service must be proved 1481. *V. infra*, 1678.

2dly. The history and particular occasion of making this act. 1480, 1481.

3dly. The law of nations is part of the law of England: and this act is declaratory of it. There is nothing new in it, but the clause which gives a summary jurisdiction for punishing the infractors of it. 1480 to 1482.

4thly. The having been, eight years before, a trader in Ireland; and having then bought silk in England, and sold it in Ireland; will not bring him within the exception in the 5th section, "of traders within the description of any of the statutes against bankrupts." 1482.

5thly. The bill of Middlesex was set aside, and the bail-bond cancelled; the defendant having *outsworn* the plaintiffs: but, by reason of the suspicious circumstances of the case, it was without costs. *ibid.*

Privilege under 7 Ann. c. 12. was claimed as domestic physician to a public foreign minister: but was clearly holden, on the whole complexion of the case, to be a mere scheme to screen him from paying his debts; and therefore disallowed. 1676 to 1679.

1st. It must be a real and *bonâ fide* service. *ibid.* *V. supra*, 1481.

2dly. Yet, in all proper cases, this statute ought to be observed in its full force. *ibid.*

3dly. It was only declaratory of the law of nations. 1678. *V. supra*, 1480. to 1482.

In these cases, the defendant himself ought to shew the nature of the service, and swear to the actual performance of it. 1731. *V. supra*.

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**Arbi-**



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### Arbitration, Arbitrators.

An award *alleged* to be made "after the making of the arbitration-bond, and before the exhibiting of the plaintiff's bill, to wit, on such a day," is sufficiently positive, even upon special demurrer. Page 1729, 1730. See *Pleading*.

### Articles of the Peace.

Mrs. Mackenzie having exhibited and sworn articles of the peace against Mr. Mackenzie her husband, his recognizance was discharged, and proceedings against him stayed, upon its appearing that he had done nothing but what was necessary to the care and cure of her as a person disordered in her mind. 1922. *V. supra*, Sir Thomas Allen's case. 806.

### Attachment

For a contempt—was granted against a man who being defendant in this court, did personally consent (at the trial) to an arbitration, and not to bring a bill in equity: but after the award, and after the rule of *nisi prius* was made a rule of court, *vis* bring a bill in equity for relief against the award, and very perversely persisted; but at length submitted, and paid full costs out of pocket: the court discharged him without ANY fine, rather than set a small one for so high an offence. 1258.

For a contempt—If the party complained of purges himself, he shall not, in general, have costs: yet in a case where the complaint appeared very groundless and vexatious, costs were ordered to be paid by the party complaining. 1329, 1330.

### Attorney

Has no privilege against the court of conscience in London. 1583. See *London*.

Is not obliged to obey a subpoena with a *dues tecum* of papers belonging to his client, in order to give evidence to a

grand jury, to prove his client guilty of having forged them. Page 1689.

### Attorney General—

May, *ex officio*, exhibit informations, and may summon the parties to *show cause*: and therefore the court will never grant an information, upon his application, in causes prosecuted by the crown. 1565.

### Averment—See *Pleading*.

### Auction

Seems not to be within the statute of frauds (29 C. 2. c. 3. § 4.) The auctioneer is an agent for the buyer, after having knocked down the hammer, as well as for the seller. 1921.

### Avoidance—

Of a benefice, by accepting another. 1504 to 1511. See *Benefice*.

Writ—See *Replewin*, *Distress*, *Exemption*.

### Award—See *Arbitration*.

### Bail.

THE established rules of the court, relating to the time and manner of SURRENDERING their principal must be strictly adhered to. 1360.

1st. The *ca. sa.* against the principal being left in the sheriff's office gives notice to the bail, "that the plaintiff would proceed against the person:" and therefore it is incumbent upon the bail, to search whether any *ca. sa.* be left in the office. *ibid.*

2d. The actual return of the *ca. sa.* or the actual filing of such return, before the issuing of the *scire facias* against the bail will not be examined into by the court: the rather,

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rather, because if the bail had even pleaded it, yet such return might have been filed at any time before replication. Page 1360.

3d. A *surrender*, half an hour before midnight of the last day, when the court was risen and no judge then accessible; and even lodging the principal, that very night in the King's Bench prison, is not sufficient; though it was the utmost that the bail had time to do; from their very late notice given them by the sheriff, of the *ca. fa.* *ibid.*

4th. For, as a *scire facias* had been duly returned, the court would not meddle with the SUFFICIENCY of the time for surrendering the principal. 1361.

*Common*—*Special*—An original debt was only 3*l.* 13*s.* 6*d.* A judgment was obtained for this debt and costs: both these, together, amounted to upwards of 10*l.* The plaintiff brought an action of debt upon this judgment, and held the defendant to bail. The special bail-piece was discharged; the original debt being under 10*l.* 1389.

*Special*—The affidavit must be positive: "that the defendant was indebted to him in such a sum, as appears by agreement bearing date such a day," will not do. 1447. *V. supra* (under pa. 655.)

Where a defendant shall be discharged on common bail, after having remained in custody two terms, WITHOUT being declared against. 1448 to 1450. See *Practice*.

Upon a *capias utlagatum*. 1412 to 1484. See *Capias Utlagatum*.

Upon bringing a writ of error. 1545 to 1549. See *Error*.

*Special*, on 26 G. 2. c. 21. § 8. and 3. Affidavit "that the plaintiff has cause of action against the defendant for 200*l.* forfeited by him, for &c."—is positive enough. 1569.

But not where it is by way of reference only. 1687. *V. supra*, 655, 1447.

Upon appearing to an outlawry—must be special, if the case originally required special bail. 1920.

An action upon a bail-bond must be brought in the same court where the bail was given. Page 1923.

### Baker

*Presented* and *amerced*, for selling bread wanting weight; and action of debt on that amercement, grafted on 3 G. 3. c. 11. 1859 to 1865. See *Court-Lect.*

### Bankrupt

Being sued as EXECUTOR, pleaded a FALSE PLEA; which being found against him, the plaintiff had judgment against him, *de bonis propriis*, for the costs: after which, he obtained his certificate. This judgment *de bonis propriis*, for the costs, is not discharged, by the certificate. 1368, 1369.

If an executor becomes bankrupt, the commissioners cannot (*per Lord Mansfield*) seize the specific effects of the testator; not even in money, which specifically can be distinguished, and ascertained to belong to such testator. 1369.

An action upon the case will lie for maliciously suing out a commission; notwithstanding the particular provision in 5 G. 2. c. 30. § 23, for preventing the taking them out maliciously. 1419.

A *feme covert* sole trader in London, is liable to a commission of bankruptcy. 1782 to 1784. See *London*.

If the husband of such *feme covert* sole trader in London becomes bankrupt, his assignees cannot take her effects to the prejudice of her creditors, nor could the husband himself meddle to the prejudice of her creditors *ibid.* And *vide ut supra*.

### Baron and Feme.

A warrant of attorney to confess judgment is given to a *feme sole*: she marries before judgment is entered up. There must be an application to the court for leave to enter up judgment; founded on an affidavit. But a judgment entered



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tered up by husband and wife, WITHOUT such previous leave, is irregular, and was set aside; but without costs. Page 1474.

A *feme covert* is liable to be prosecuted and punished for crimes and offences, 1679 to 1682. See *Orders of Bastardy*.

A *feme covert* SOLE TRADER in London. 1782 to 1784. See *Bankrupt, London*.

**Bastard**—See *Orders of Bastardy*.

Producing bastards is treated as an offence and a crime, by 18 *Elix. c. 3*: not only as against the laws of God and man, but as burdening the parish. 1681.

A *feme covert* is liable to this act, 1681, 1682.

If she was *unmarried* when the order was made upon her, her marrying afterwards, will not purge the crime: she still remains the object of criminal jurisdiction. *ibid*.

There is no need to summon the husband: he is not liable for the criminal conduct of his wife. *ibid*.

### Beech

May be timber, by the custom of that part of the country where it grows: its being timber, or not, does not depend upon the use that 'tis put to; but upon the custom of the country, 1310 to 1312.

### Benefice.

If a person having a benefice with cure of souls, of the yearly value of 8*l*. accepts another with cure of souls, and be instituted and inducted, the first is void; and the patron may present another to it, as if the incumbent had died or resigned: so is 21 *H. 8. c. 13. § 9, 10.* 1504 to 1511.

1st. The avoidance of the former benefice does not take place, as to lapse, till INDUCTION to the second. 1510.

2dly. Though the patron has six months from the induction, to present, to save the incurring of a lapse; yet he may, if he pleases, present before the induction. Page 1512.

### Bill of Exchange

FORGED, but not discovered to be so, was accepted and paid by the drawee to the indorsee, who paid a full and valuable consideration for it, and acted innocently and *bona fide*, without the least privity or suspicion of the forgery: The drawee can not recover the money back from the indorsee in an action for money had and received to his use. For even supposing no negligence in the plaintiff: yet there is no reason to throw off the loss from one innocent man upon another innocent man. 1354 to 1357.

A merchant gave a cash-note upon his banker, to Bicknell, worded thus—“Pay to ship Fortune, OR BEARER, such a sum.” Bicknell lost it. GRANT received it in payment, in the course of trade, fairly, *bona fide*, and for a valuable consideration. Payment being refused, GRANT brought his action against the drawer (the merchant,) and inserted two counts; one, upon an inland bill of exchange; the other, an *indebitatus assumpsit* for money had and received to his use. 1516 to 1530.

1st. This bill or note is negotiable. 1523 to 1530.

2dly. “Whether a bill or note be negotiable, or not,” is a question of law; and not of fact, to be left to a jury. *ibid*.

3dly. This loss ought to fall upon Bicknell, who lost the note; not upon Grant, who came fairly by it. *ibid*.

4thly. The bearer (proving that he came fairly by such a bill or note) may maintain his action against the drawer, in the bearer's own name, as bearer. *ibid*.

5thly. And it seems, that he may declare UPON it, as upon a specialty,

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cialty, (contrary to the opinion of Lord Ch. J. Holt.) Page 1525 to 1529.

6thly. But, undoubtedly, an *indebitatus assumpsit* for money had and received to the plaintiff's use, may be brought by the *bona fide* bearer of a bill or note made payable to bearer. *ibid.*

7thly. There is no sort of foundation for a distinction, "that such a note or bill is negotiable in London only, and not every where else." 1529, 1530.

*White*, A merchant in Ireland, drew upon the plaintiffs (*Pillans and Rose*) merchants in Holland, for 800*l.* payable to *Clifford*. They paid the money to *Clifford*; and then wrote to the defendants (*Van Mierop and Hopkins*, merchants in London), to know "Whether they would accept such bills as they should, in about a month's time, draw upon them. for 800*l.* upon the credit of *White*." The defendants wrote back, "That they would honour their bill drawn on account of *White*." The plaintiffs accordingly drew upon the defendants. But, in the interim, *White* failed. The defendants gave notice of this to the plaintiffs, and forbade the plaintiffs to draw upon them. But the plaintiffs did, nevertheless, draw upon them. And the defendants refused their bills. The plaintiffs brought their action against the defendants: The jury found for the defendants. The court *set aside their verdict*. 1663 to 1675.

1st. This is *not nudum pactum*, and a void undertaking upon the foot of the consideration being *past*. *ibid.*

2dly. If the undertaking had been upon a *past* consideration, or even no consideration, yet, in this commercial case, it would bind. *ibid.*

3dly. The idea of a *nudum pactum* was well explained. *ibid.* See *Nudum Pactum*.

4thly. In commercial cases, amongst merchants, the want of a consideration is no objection. 1669

5thly. Nor will that objection hold in other cases, perhaps, where the undertaking is in writing. Page 1669 to 1671.

6thly. The law of merchants is the law of the land: And the court are to judge of it; not the jury. 1669 to 1674.

7thly. The acceptance of a bill needs not to be upon the bill: It may be collateral. 1674.

8thly. It will bind, though no effects of the drawer are in the hands of the acceptor. *ibid.*

9thly. So will an acceptance for the honour of the drawer. 1674, 1675.

10thly. This agreement, "to accept" is a virtual acceptance. *ibid.*

11thly. A small matter amounts to an acceptance. *ibid.*

### Bill of Exceptions.

Lord Chief Justice PRATT came personally into the court of King's Bench, pursuant to a writ, to acknowledge his seal. 1692.

1st. The tenor of the writ. 1693.

2d. The form and ceremony of the transaction. 1692 to 1694.

### Bonds.

The just intent of a bond; and the construction of the act of 4, 5 Ann. c. 16. § 13. 1370 to 1375. See *Practice*, (*Payment of Money into Court*.)

Conditioned, that whereas an unmarried woman and a man had agreed to live together, he had therefore agreed to find her meat, drink, washing, and lodging &c; and to leave her an annuity if he quitted her, or she outlived him: and if they had any child, he to provide for it: But if she should leave him or go to another man, then he should not be obliged to provide for her any longer, or to leave her any annuity.—is illegal, and void. 1568, 1569.



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### Bottomree.

Bottomree and respondentia interest, when insured, must be specified in the policy. Page 1401. See Policy of Insurance.

**Bread.** See Baker, Court-Leet.

### Bribery—

#### At Elections to Parliament—

1st. The statute of 2 G. 2. c. 24. (for the more effectual preventing bribery and corruption therein,) sect. 7. discussed and explained. 1237. See Declaration.

2dly. Giving a bribe to vote or to forbear voting, is an offence within this act and clause; although the voter do not comply with his engagement, *ibid.*

#### Elections to Parliament.—

1st. Was always a crime at common law; and, consequently, punishable by indictment or information. 1338.

2dly. The statute of 2 G. 2. c. 24. (abovementioned) never meant to take away the common law-crime; but to add a penal action, with full costs, and attended with disability to vote in any such election, or to hold any office or franchise in a corporation. 1338 to 1340.

3dly. It still remains, therefore, a crime at common law: And a conviction upon an information granted by the court, is just the same as a conviction upon indictment. *ibid.*

4thly. In general, The court never ought to interpose by information, within the two years limited by this statute (§ ult.) for bringing a prosecution upon it: Though there may possibly be particular cases, where it may be right to grant an information before the two years are expired. *ibid.*

5thly. In the present case, where an information had been granted within the two years, (without a sufficient advertence to the consequences;) and the defendants were convicted and sentenced within the two

years; the court did not inflict a punishment adequate to their offence, but only an additional one, over and above the punishments inflicted by the statute; to which statute-punishments, the defendants still remained liable. Page 1340. *V. infra*, next case.

#### At Elections to Parliament.

In a similar case to the last, (V. subdivision 5th.) the sentence was adjourned from the end of Michaelmas term to the first day of Easter term; because the time limited for bringing the *qui tam* action was to expire in the intermediate month of March. 1359. Afterwards 200 l. fine, and three months imprisonment were inflicted. 1389.

At elections to parliament—priority of suit. 1423 to 1434. See Pleading.

At elections to parliament—Evidence to support the declaration, 1586 to 1591. See Evidence.

### By-Law—

In London, “That no BUTCHER by trade shall be admitted into the freedom of the city, in any other company, but that of BUTCHERS.”—is a good by-law. 1329.

A recent charter (not 20 years old) places the election of common-council-men in the mayor, jurats, and commonalty: And it gives the power of making by-laws, to the mayor, jurats, and common council. The mayor, jurats, and common council make a by-law, in order to prevent riot, disorder, and popular confusion, which places the election of common council-men for the future, in the “mayor, jurats, and common council, and such of the common freemen as should respectively have served for one whole year, respectively, the several offices of “church-warden and overseer of the poor, or the major part of such mayor, jurats, common council-men, and common free-men QUALIFIED AS AFORESAID; without the presence or concurrence of ANY of the COMMON-ALTY.” This is a bad by-law. 1827 to 1840.

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1st. It is settled, that the number of the *electors* may be narrowed by a by-law; but not the number of the *eligible*. Page 1833. V. *infra*.

2d. A by-law cannot strike off an integral part of the electors. *ibid*.

3d. Neither can the makers of a by-law take the election from others, and place it in themselves. 1834, 1837, 1839, 1840.

4th. Neither can they *superadd* a qualification not mentioned in the charter, nor at all connected with the corporate character of the electors. 1839, 1840.

A by-law which lays a *restraint upon trade* is bad; unless there be a custom to support it. 1856 to 1859.

### Capias Utlagatum.

**W**HERE the *sheriff* may discharge the defendant on his *attorney's engagement under his hand*, "to appear and reverse the outlawry." And where he must take *security by bond*, &c. 1482. to 1484.

### Cases doubted or denied.

*Cro. Eliz.* 232. Perrot v. Austin 1383. See *Executor*.

1 *Salk.* 483. The case of the parish of St. Leonard Shoreditch. 1460. See *Justices*.

1 *Bulstrode*, 184. *Anon.* 1474, 1745. See *Umpirage*.

*Perkins* 96. b. Title "*Devises*," section 500 denied, in the sense endeavoured to be put upon it; but explained in its true sense. 1497. See *Joint tenants*.

*Clerke v. Martin*, 1 *Ann. B. R.* 2 *Ld. Raym.* 757. and 1 *Salk.* 129. 1520 to 1529. See *Bill of Exchange*.

*Rex v. Inhabitants of Hornsey*—4 *Mod.* 38. *Holt* 338. 12 *Mod.* 13, 1 *Showers* 270 and 291. *Cartbrow* 212. discussed, compared, and settled. 1531. See *Highway, Presentment*.

*Hayes v. Warren*, 2 *Strange* 933—was called "a strange and absurd case," by Mr. justice *Wilmot*. 1671. See *Bills of Exchange*.

*Lloyd v. Gregory*, *Cro. Car.* 502 &c. } discussed and settled. Page 1806,  
*Thompson v. Leach*, 3 *Lev.* 284 } 1807. See *Infant*,  
 &c. &c.

### Certiorari—

To remove an order of *Quarter-Sessions*, made upon appeal from a *Scavenger's rate*. 1458 to 1460.

To remove *convictions* on the game-acts. 1720 to 1723. See *Costs*.

**Challenge**—See *Information*; See also *Pannel, Juror*.

**Church-wardens**—See *Mandamus*.

### Clerk in Court—

His *bill*, included in the attorney's bill to his client, and taxed together with it, was ordered, after the attorney's death, to be paid by the original client to the clerk in court; and the remainder of the attorney's bill, to his executrix. 1313.

**Committitur**. See *Prisoners, Practice*.

### Commitment—

By two justices, of a *rogue and vagabond* to the house of correction, under 17 G. 2. c. 5. § 7. for running away from his parish, and leaving his wife and children to be maintained by the parish. Three objections were taken—

1st. That he was not convicted. 1636.

2dly. It is not alledged "That his wife and children were chargeable to the parish." *ibid*.

3d. The commitment is not for a limited time; but "till he shall be discharged according to the laws and customs of this realm." *ibid*.

The man was discharged, as the 2d and 3d objections were sufficient to invalidate the commitment; the court giving no opinion about the necessity of a formal conviction. *ibid*.

Of



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Of a *feme covert*, for disobeying an order of bastardy. Page 1679 to 1682. See *Orders of Bastardy*.

### Common Recovery—

The writ of summons was returnable at a return-day within the term, *viz.* "in one month from the day of *Easter*;" which was on a *Sunday*: And the tenant in tail (who was vouched) *DIED upon that same SUNDAY*. This common recovery was *reversed*: because the judgment *could not* have been till given *AFTER the death* of the tenant in tail. 1595 to 1602.

1st. A judgment *relates* to the *Essoin-Day* of the term; unless something appears upon the record, shewing that it *can not* have such relation. 1596.

2d. In such case, it *relates only so far back*, as is consistent with the record. 1597.

3d. This judgment *relates only* to the *essoin-day* of the return of the writ of summons. *ibid.*

4th. That was *Sunday*: And the court *can not sit on a Sunday*; and consequently, they could not give judgment till *Monday*; neither could the vouchee have appeared, till *Monday*. 1597 to 1602.

5th. *Anciently*, the courts of justice *did sit on Sundays*. 1597, 1598.

6th. But, by canons and constitutions received and confirmed and thereby become part of the common law of England, *Sundays* are *not juridical*. 1598 to 1602.

### Constable.

A *deputy high-constable*, appointed by *parol only*, may *billet soldiers*, 1262. See *Mutiny-Acts*.

### Contingency—

A *contingency* is not within the statute of frauds (29 C. 2. c. 3. § 4.) nor any case that *depends upon contingency*. It does not extend to cases where the thing *only MAY* be performed within the year: It extends only to such promises where, by express appointment,

the thing is *NOT* to be performed within a year. Page 1281, 1282.

### Conversion—

*Refusal* upon demand is *not* an actual conversion; but *evidence* of it. 1243.

### Conviction—

On 9, 10 W. 3. c. 27. § 1. 1472 to 1474. See *Hawkers and Pedlars*.

On 9, 10 W. 3. c. 27. § 8. for trading &c, *without having* a licence, is good; though the evidence was only, "that he *refused to produce it*." 1476. See *Hawkers and Pedlars*.

On the game-act 5 Ann. c. 14. § 2. *certiorari* brought; conviction *affirmed*.

1st. *Costs*—where *payable* to prosecutor; and where *not*. 1720 to 1723. See *Costs*.

2dly. *Copy*—where the justice ought to let the defendant have a *copy*. *ibid.* See *Costs*.

A conviction was *affirmed*, though it did not appear that the defendant was *summoned*, or that the witness was *examined in his presence*. 1786. For

1st. He *appeared*; and though he *denied* guilt, he did *not desire* further time to prove his innocence. *ibid.*

2dly. It may be *presumed* "that the *witness was examined in his presence*." *ibid.* V. *supra*, p. 1163 to 1167.

### Copies—

Of a *conviction*—where it ought to be granted. 1720 to 1723. See *Conviction, Costs*.

### Copyhold.

Formerly, copyholds were mere tenancies *at will*. 1543.

They acquired *stability*, by *custom*. *ibid.* The lord is not intitled to his *fine*, till *admittance*. *ibid.*

But the *admittance* is merely form. *ibid.* The estate *remains in the surrenderer*, till *admittance*. *ibid.*

The

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The admittance must be *secundum formam et effectum sursum redditionis*. Page 1543.

The person admitted shall be in, by him who made the surrender. *ibid.*

The estate must be according to the surrender; not according to the admittance. *ibid.*

If the lord grants the land, by copy, to another, it is without warrant. 1544.

Where and how the grant may be traversed. *ibid.*

First upon the admission of an infant—how to be recovered. 1717 to 1720. See *Infant*.

### Corporation, Corporators.

Books and records—inspection and copies of them. See *Books of Corporations &c.*

Corporate-office void by a judgment of ouster—when and by whom a mandamus “to go to a new election” may be moved for. 1386, 1387. See *Practice*.

A new corporation must take a new charter, as it is given. But a corporation already subsisting are not obliged to accept a new charter *in toto*: They may act partly under it: and partly under their old charter or prescription. 1656, 1661, 1663. See *Mandamus*.

The universities are lay-corporations, per Lord Mansfield: And the crown can not take away their ancient rights or usages. 1656. See *Mandamus*.

Where the power of making by-laws is by charter given to a select body, they do not represent the whole body, but where such power is in the body at large they may delegate their rights to a select body; who become the representative of the whole community. 1837.

Neither the sheriff being a freeman can array the panel, nor a juror being a freeman can be admitted to serve, where the action is brought in the corporation-court by the treasurer of the corporation, for a penalty of a by-law “that none but freemen shall keep open shop in it.” 1856 to 1858.

An old corporation accepted a new charter, by a different name, viz. “mayor and commonalty,” to consist of a mayor and 11 aldermen (out of whom the mayor to be chosen,) 18 assistants and

18 common council. A bond had been given to the old corporation in 1735, before the new charter; which new charter was dated in 1763. In the interim, viz. in 1740, there were judgments of ouster against the mayor and all the aldermen: And they were all of them dead before the new charter. An action was brought by the new corporation, upon this bond. Resolved, that it was maintainable. Page 1866 to 1873.

1st. The acceptance of a new charter does not destroy their former rights. 1871 to 1873.

2d. The corporation is not dissolved by this judgment of ouster against individual members. *ibid.*

3d. Neither the removal of their officers, nor the change of their corporate name, can extinguish their former rights. *ibid.* Their old rights remain. *ibid.* And the new charter revives them, and puts them into action again. *ibid.*

4th. The 11 G. 1. c. 4. did not consider corporations who had slipt the fixed day for electing chief officers, as being dissolved; but meant to revive their activity, and put them again in motion. *ibid.*

5th. The action is properly brought in their new name of incorporation. *ibid.*

### Costs.

Full costs; or no more costs than damages: The question discussed and explained. 1282 to 1284.

In *replevin*, on 8, 9 W. 3. c. 11. § 1. 1286, 1287. See *Replevin*.

All statutes relating to costs are construed strictly: (But not for this bad reason, because costs are in the nature of a penalty”) *ibid.*

For not going on to trial—shall be paid to the defendant, by the course of the court, on informations for misdemeanors, where the prosecutor does not countermand in due time. 1305.

Upon attachment for a contempt, granted upon cause shewn.

1st. The general course and practice of the court is not to give costs to the party complained of though he



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he purges himself upon his examination. Page 1329, 1330.

2dly. Yet in a case where the complaint was *very groundless and vexatious*, it was done. *ibid.*

By an executor upon discontinuing his action, shall not be paid, where he is obliged to declare as executor: otherwise, where he has knowingly brought his action wrong. 1451. *V. infra*, 1584 to 1586.

By a prosecutor, upon quashing his own indictment, may, in some cases, be insisted on: for, a motion for "leave to quash his own indictment," is by no means a motion of course. 1469.

By an executor or administrator—

- 1st. Shall be paid.
- 1st. For not going on trial, according to notice. 1584 to 1586.
- 2dly. Upon being non-pressed for want of declaring in due time. *ibid.*
- 3dly. Upon a discontinuance: quære. *ibid. V. supra*, (sub. p. 1451.) *V. infra.*
- 4thly. The privilege of executors is too great: *per lord Mansfield*. 1585.
- 2dly. Shall not be paid, upon a non-suit. 1586.

On discharging a rule to shew cause against an information for a misdemeanour, were added to the rule; because the complainant had suppressed the truth. 1684, See Information.

Full; or no more than the damages. 1688, 1689. *V. supra*, 1282 to 1284.

For not going on to a trial, pursuant to a notice given by the defendant who had removed an indictment by certiorari, are not payable, where only five of a special jury (moved for by himself) appeared; and neither side would pray a tales. 1695.

On removing a conviction upon 5 Ann. c. 14. "for better preservation of the game."

- 1st. By sect. 2. no certiorari shall be allowed, upon ANY pretence whatsoever, unless the defendant shall previously be come bound to the prosecutor in 50l. (with sureties) "to pay the prosecutor his full costs and charges (to be

ascertained upon the prosecutor's oath,) within 14 days after affirmance or proceſſendo." Page 1721.

2dly. Yet if the certiorari, is brought not for vexation, nor in opposition to the conviction; but from absolute necessity, (in order to plead it to an action brought oppressively for the same offence;) the defendant shall not pay costs. 1721, 1722.

3dly. On the contrary, he ought to receive costs, where the plaintiff in such action is nonsuited. *ibid.*

4thly. The justice ought to have let the defendant have had a copy of the conviction. 1721, 1722.

Are reciprocal: Wherever the plaintiff would be intitled to them, the defendant is so, reciprocally. 1724.

- 1st. In an action on a penal statute, brought by the party grieved, the plaintiff would receive costs, if he prevails: therefore he shall pay them, if he does not. *ibid.*
- 2dly. Costs to defendants are given by 4 J. 1. c. 3. § 2. See also 23 H. 8. c. 15. § 1. and 18 Eliz. 5. § 3. *ibid.*

### Covenant.

A covenant is not revocable, (as a will is,) 1256.

A covenant "to stand seised to uses," is nota revocation of a will. *ibid.*

By a lessee (for himself and his assigns) to build a new house on the premises within a LIMITED time: which is not done within the time limited. AFTER the expiration of the time limited, the lessee assigns: the assignee is not liable; because the breach was committed before his time, and this covenant does not run within the land. 1272, 1273.

Of a testator or intestate—where it may be given in evidence, by an executor or administrator. 1383, 1384. See Evidence. Executor.

"To stand seised"—(entered into by the owner—) may be a lease. 1446. See Powers, Lease.

An express covenant by a master of a ship, "to go to Winyaw," there to receive the plaintiff's goods; (for which the plaintiff

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plaintiff covenanted to pay such and such freight :) *Provided* that if his ship should not be arrived there *before* such a day, it should be at the plaintiff's option, to load the ship on the agreed terms, or not. The defendant was *bound to go*, at all events. Page 1637 to 1640.

1st. An *express* covenant shall bind to performance, where an *implied* one or one *created by law* shall be excused by a disability to perform, which happens *without* the party's default or power to prevent. *ibid.*

2dly. This *proviso* was intended to *quicken* the defendant; but shall *not excuse* him for *not going at all*. 1640.

### County—

Where an action or information, laid in one county, may be tried in another. 1330 to 1335. See *Trial, Venue*.

Court.—See *Practice*.

### Court-Leet.

Action of debt, for an *amercement* set and assized in a *court-leet*, on a *presentment* there, for having in his custody, and exposing to sale, a loaf of bread pretended to be, and as and for a *quartern loaf* of the weight of 4lb. 5oz. and  $\frac{1}{2}$ ; whereas it wanted 4oz. and  $\frac{1}{2}$ . Resolved—

1st. It is *not* necessary, that the *presentment* be either *sealed* or *indented*. 1860.

2d. The *rise* and *progress* of *turns* and *leets*, discussed. *ibid.* and 1861.

3d. The offence here presented is *not* within the *jurisdiction* of the leet. 1861.

4th. The offence *cognizable* there, is *fractio affixe*. 1862.

5th. The leet has *no jurisdiction*, where *no assize* is set: The *setting* the assize is the *basis* of their jurisdiction; which only

arises, and can *only attach*, when the assize is set. Page 1862.

6th. The assize must fix both *price* and *weight*. *ibid.*

7th. The 3 G. 3. c. 11. (upon which this presentment is grafted) does not fix the *price*: It only fixes the *weight*. Therefore it is *not an assize*: It wants an essential characteristic of an assize. It was intended, only to supply the *defect* of an assize, and to operate *where* and because there was none. *ibid.*

8th. The 3 G. 3. c. 11. has *no saving* of the jurisdiction of the leet; because it was providing for cases where the leet had *no jurisdiction*. 1863.

### Custom—

“To *give notice* to the owner of tithes, of *setting them out*—” is a good custom. 1894. See *Tithes*.

Must be *proved*, where it is a necessary foundation to support a by-law. 1854 to 1858.

### Customary-Tenants.

The *freehold* is in the lord. 1278.

Whether they can prescribe in *non decimatio*; and how. 1275.

### Debtors—

INSOLVENT. 1809. See *Prisoners, Statutes*.

### Declaration—

FOR CORRUPTING a voter to give or forbear giving his vote contrary to the statute of 2 G. 2. c. 24. § 7. “for the more effectual preventing “bribery and corruption in the election of members to serve in parliament.”

1st. Needs not alledge “that the voter complied with his promise.” 1237.

2d. For



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2d. For the giving a bribe to vote or to forbear is a complete offence within the act, on the part of the corrupter, even though the voter should act contrary to his promise. *Page 1237.*

3d. The defendant gave 5 guineas to the voter; the voter gave him a note for it; and he gave the voter a counter-note "to give up the former after the condition performed." This (being proved) will support a count laid for giving 5 guineas: for the note and counter-note are mere colour, disguise and device to evade the law. *ibid.*

4th. On a general verdict, the court will not grant a new trial to the defendant where no real injustice is done him by the officer's having mistaken the count upon which it is taken: They would rather order it to be set right. *Per Lord Mansfield. ibid.*

With a general memorandum has a fictitious relation to the first day of the term: But evidence may be given of the writ being in fact sued out on a subsequent day. 1243.

In *assumpsit*, for a port-duty, needs not shew a consideration: Otherwise, of a toll-thorough. 1404 to 1407. See *Toll.*

By a bearer of a cash-note or bill made payable to bearer. 1523 to 1529. See *Bill of Exchange.*

Against a defendant in custody—must be before the end of the second term. 1788. See *Practice.*

### Deeds.

There is an important distinction between the deeds of *femes covert*, and the deeds of *infants*: Those of *femes-covert* are void, and "*non est factum*" may be pleaded to them; But those of *infants* are only voidable, and the infancy must be specially pleaded; and that plea avoids it, by relation back to the delivery. 1805.

### Demurrer.

A real fair demurrer is an *issueable plea* within a judge's order "for pleading an issueable plea": But a *sham* demurrer is not so. *Page 1788*  
1789.

### Detainer—

By inn-keepers, farriers, tailors, manufacturers, &c.: Who may, and who may not detain; and why. 1500 to 1503.

### Devises.

Sir John Lade devised to trustees and their heirs, upon trust and to the use of *John Inskip*, in strict settlement; with remainders over, in strict settlement; and added a proviso, "that so often as, and during such time as the person who for the time being (in case the testator had not otherwise directed) would have been intitled in possession, as tenant for life or tenant in tail, should be UNDER the age of 26 years, then the TRUSTEES WERE TO ENTER, and RECEIVE ALL the rents and profits: Out of which, they were to allow a specified MAINTENANCE for such tenant for life or in tail; and all the rest was to ACCUMULATE, and to be laid out in the purchase of land, and settled upon the same trusts and uses." *John Inskip* died; leaving his wife enceinte with a son. Question. "Whether the heir at law of the surviving trustee did, upon the birth of the infant, take any, and what estate, by virtue of the proviso." Certified, "That He did NOT take ANY estate by virtue of the proviso." 1416 to 1418.

The intention of a testator is to be collected from the whole of his will: And such collection must be founded upon the writing itself. 1541. *V. infra*, 1622.

Particular

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*Particular cases* generally serve rather to confound than to illuminate questions about the intention of a testator. Page 1622.

A devise of copyhold land and cottages; of 5l. 6s. *per annum* value, "to Sarah B. she paying THEREOUT 40 s. a year to her sister Elizabeth B." was collected from the whole of the will, to be a devise of the inheritance to Sarah; and an intention that Elizabeth's annuity should continue during her life. 1540, 1541. *V. infra*, 1622.

The mere expression, indeed, of "paying THEREOUT" is only equivalent to "paying out of the RENTS AND PROFITS;" and therefore is not to be considered as a charge of a payment of a sum in gross, (which will carry a fee, though not devised "to the devisee and his heirs.") 1541, 1542, and 1537.

Sir Samuel Daniel devised to Samuel Duckenfield, son of Charles Duckenfield, Esq; (by Sarah the testator's sister,) during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to Charles Duckenfield, another of the sons of the said C. D. Esq. during his natural life, and to the heirs male of his body lawfully to be begotten; and for want of such issue, to John Duckenfield, another of the sons of the said C. D. Esq; during his natural life, and to the heirs male of his body lawfully to be begotten; and for want of such issue, then to EVERY son and sons of the said Charles Duckenfield Esq; which shall be begotten on the body of Sarah his now wife; and for want of such issue, then to William Hulton during his natural life, and the heirs male of his body lawfully to be begotten; with the like remainders to Samuel Goldston, and afterwards to James Goldston; and for want of such issue, to the right heirs of the said Sir Samuel Daniel, the testator, for ever. There was a proviso containing an express condition annexed to the devise to the said Samuel Duckenfield and others as aforesaid, "That

"if the estates devised to him or

"them and their descendants, should come to him or them and be in possession; then and thereupon, he and they and their descendants to whom the premises shall come and be in possession, shall procure an act of parliament to take his name and arms &c; Or otherwise, their estates shall determine." He also devised several things to go, as heir-looms, along with the estate: And he gave powers to make leases, and also to make jointures, to the amount of 200 l. *per annum*. The three sons of C. D. Esq; viz. Samuel, Charles, and John, all died without issue. But C. D. Esq; had a fourth son, named WILLIAM, born after the date of the will; who became seized, and took the name and arms, according to the directions of the will. Resolved, that William took an estate in tail-male. Page 1570 to 1582.

1st. The construction must clearly be agreeable to the intention of the testator, collected from the will and circumstances. 1581.

2dly. The testator intended to give the same estate to the after-born sons of C. D. Esq; as to the three prior-born; viz. an estate in tail male, in succession. 1579 to 1580.

3dly. This manifest intention shall prevail against the words *ibid*.

4thly. Though the controversy here was between the testator's heir at law (claiming under the last remainder "to the right heirs of the testator,") and the devisee of William (who had suffered a recovery;) yet it must be considered as a question between prior and subsequent remainder-men: And therefore all arguments in favour of the plaintiff, as heir at law, were laid out of the case. 1579 to 1580.

To John Haselwood, of a house and garden, of the yearly value of 10 l. charged with the payment of 50 l. to be paid out of the yearly rents and profits, payable yearly and every year



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until it be fully paid: And if John die in his minority, then a devise over, to persons not heir at law to the testatrix. Page 4618.

1st. A testator's intention must be collected from all the parts of the will compared together. 1622 to 1625. *V. supra* 1541.

2dly. The whole of this will, taken all together, shews that an estate in fee was intended to be given to John: And therefore he took a fee. 1612 to 1625.

3dly. Though the charge is made payable "out of the rents and profits," yet it is accompanied with such other clauses, as take it out of the distinction in Collier's case, 6 Co. 16. a. *ibid.*

Joshua Brown devised thus—After the death, without issue, of his nephew William Brown, eldest son of his brother Reginald Brown, "then to the second son of his said brother Reginald, for and during the term of his natural life; and from and after the death of the said second son of his brother Reginald, then to the first son of the body of such second son of his said brother Reginald, and to the heirs males of the body of such second son; and for default of such issue, to the third, [omitting the second] fourth, fifth, and every other younger son or sons of the said second son of his said brother Reginald (according to their seniority,) and to the heirs males of the bodies of the said third, fourth, fifth and other sons of the said second son of the said Reginald Brown." At the time of making the will, Reginald had no other son but William: His second son, Thomas was born after the making of the will, and even after the testator's death. Thomas, the second son of Reginald, took an estate TAIL under this will. 1636.

1st. The court could not supply the limitations supposed to be omitted in transcribing from the original draught of the will. 1634, 1635.

2dly. If they could, yet the unborn sons of an unborn son could not have

taken: A possibility can not be limited upon a possibility. Page 1634, 1635.

3dly. In order to effectuate the general intention of the testator, they construed "Son" as a word of limitation, and that it was an estate tail in Reginald's second son. *ibid.*

4thly. A private act of parliament, procured by Thomas on his own petition, to enable him to grant building-leases, which recited "that he was only tenant for life under this will," was holden not to affect the present case and question. *ibid.*

An estate in fee was holden to pass to a trustee, by necessary implication of the testator's intention; without the word heirs or any other technical term, 1686.

Sir Thomas Chitty made a will, consisting of two sheets of paper, all of his own hand-writing; and signed at the bottom of each page: he also made a codicil, upon a single sheet. He called in a witness; shewed him both sheets, and his signatures: and told him "That was his will." He also shewed him the codicil, and desired him to attest both the will and the codicil: which he did, in the presence of the testator; and then went out of the room. Two other persons came in, immediately afterwards. The testator shewed them the codicil and the last sheet of the will; and sealed both, before them: and delivered both, severally as his act and deed. They attested the same, in his presence; but never saw the first sheet of the will; nor was it produced to them; nor was it upon the table. Both the sheets of the will were found, with the codicil, in the testator's bureau, after his death, all wrapped up in one piece of paper: But the two sheets of the will were not pinned together. 1773, 1774.

1st. This is a good will, as to the personal estate. 1774.

2dly. And if the first sheet was in the room, at the time of the execution

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execution and attestation, it would be a good will and a due execution of it, as to the real estate also. Page 1774.

3dly. But if the first sheet was not then in the room, a doubt might arise "Whether it was duly executed and attested with respect to the real estate." *ibid.*

"To his five children, and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common, and not as joint-tenants"—is a tenancy in common, in fee. The words "survivors and survivor" relate to the death of the testator. 1886.

Of a house and stable (worth only 100 l.) after two lives, to seven children of her two cousins Thomas Brownbill and Samuel Water, or such of them as shall be then living; share and share alike. It was holden to be the intention of the testatrix, "that it should be sold and the value divided amongst them." And judgment accordingly. 1897, 1898.

### Discontinuance of Action—

By a plaintiff—executor. 1451. See *Costs, Executor.*

### Distress—

For rent—

1st. Qu. upon what, the right of landlords to distrain the property of a third person, is founded, 1500 to 1503.

2dly. What things, belonging to such third persons, are exempted from being distrained: And what, of them, are liable to it. 1498 to 1504.

1st. Exempted things were said (*arguendo*) to be—

1st. A horse at an inn. *ibid.*

2d. A horse at a farrier's, left to be shod. *ibid.*

3d. A horse that bring goods to market to be sold *ibid.*

4th. The goods themselves so brought to market, 1489 to 1504.

5th. Goods on a wharf or at a warehouse, for exportation. Page 1489, to 1504.

6th. Goods in the hands of a factor. *ibid.*

7th. Goods delivered to a carrier, to be carried for hire. *ibid.*

8th. Wool in a neighbour's barn. *ibid.*

9th. Cloth at a weaver's *ibid.*

10th. Cloth at a tailor's. *ibid.*

2dly. Not exempted—

1st. Goods left at an inn. *ib.*

2d. A gentleman's chariot standing in a coach house belonging to a common public-livery stable keeper, and being parcel of and rented with the livery stables, by the livery stable keeper, of his landlord, who thus distrained it so standing at livery, for rent due to him from the stable keeper. *ibid.*

### East India Company.

THEIR charter-parties, voyages, course of trade, and insurance upon ships in their service. 1707 to 1715. See *Policy of Insurance.*

### Ejectment.

NEW TRIALS may be granted in ejectment cases, as well as in others; if the circumstances justify it: yet it is not every slip or mistake, that shall be a ground for it, if no injustice is done. 1255.

The idea of an ejectment: the origin, improvement, utility, ease, and expedition of this ingenious fiction adopted (in lieu of almost all real actions) for the trial of titles to the possession of land. 1292, 1293, 1294, 1295, 1300 to 1304.

It's great advantage is, that being under the control of the court, it may be so managed and modelled as to answer every end of justice and convenience. *ibid.*



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Admission of landlord as a co-defendant, or to defend alone. Page 1292, 1293, 1294, 1295, 1300 to 1304.

1st. A fair trial between the claimants, is the ground and reason of both. *ibid.*

2d. The latter, *viz.* "to defend *"instead of the tenant in possession who abandons,"* is as reasonable as the former. *ibid.*

3d. *Resciet* "to defend *pro interesse suo*" was the practice before 13 E. 1. c. 3. or 11 G. 2. c. 19. 1301, 1302.

4th. The extent of the term "landlord", as used in 11 G. 2. c. 19. 1293.

5th. If the tenant in possession claims nothing, he ought to take no side between the claimants, who ought to have a fair trial between them upon the real merits 1293, 1300, 1304.

On a writ of error in parliament, brought upon a judgment in ejectment, the court obliged the plaintiff in error to enter into a rule "not to commit waste" during its pendency." 1823.

Confession of lease, entry, and ouster—

1st. A discussion of the reason and practice of it. 1897, 1898.

The meaning of it is, "to bring the matter to the mere question of the plaintiff's possessory title." 1897.

2d. It is sufficient to bar a nonsuit for want of proof of actual ouster. 1897.

3d. It is sufficient, in an ejectment upon a condition broken. *ibid.*

4th. And in all cases but to avoid a fine: in that case, there must be an actual entry. *ibid.*

5th. In the case of a tenant in common, it is sufficient, without proof of actual ouster. *ibid.*

Trustees shall not recover possession from or dispute it with their cestui qui trust. 1901.

### Election—

To parliament—See Parliament, Bribery. The nomination of a parish-clerk was

in the rector: but the consent of the vestry was necessary to confirm it. The rector nominated Dr. Jackson. A vestry met, and 89 signed their approbation; none expressly dissented. But some demanded a poll on behalf of one Mr. More. The churchwardens refused to take any poll. This was no dissent to the rector's nomination, it was all nugatory. If the majority was really dissentient, they should have declared their dissent. Page 1878.

### Error—

Bail is not requisite, upon bringing a writ of error upon a judgment in an action of DEBT founded upon a prior judgment. 1548. because

1st. This is a *casus omissus* out of 3 Jac. 1. c. 8; which is to be taken literally, and not extended by construction. 1549.

2dly. The contract is extinguished by the first judgment. 1548.

3dly. A judgment is no contract, nor can be esteemed a contract. *ibid.*

4thly. An action of debt upon a judgment is an action of a superior nature to any of the actions specified in 3 J. 1. c. 8, and therefore shall not be included in it. *ibid.*

Neither is bail requisite, as it should seem (*sed qu.*) upon bringing a writ of error returnable in parliament, upon a judgment in B. R. in an action of debt brought upon a recognizance in error. 1567, 1568.

A writ of error can not be non-pros'd, without a rule "to assign errors." 1772.

A plaintiff may bring a writ of error, to reverse his own judgment. 1772.

And if he will not proceed, the court will make a rule to oblige him to assign errors within a limited time. *ibid.*

In such a case, the common method, of a *scire facias quare executionem non*, or a *scire facias ad audiendum erroris*, would be improper. *ibid.*

In a *scire facias*, no damages can be recovered. 1791.

A writ of error brought by one defendant only, upon a judgment against several, is not good. *ibid.*

But

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But a *scire facias quare executionem non* may be prayed and sued out by one executor upon a writ of error brought upon a judgment for him and another, without shewing "that the other executor is dead," Page 1791.

The court ought to support a judgment upon the merits. *ibid.*

A writ of error upon a judgment in ejectment, being brought returnable in parliament, the court obliged the plaintiff in error to enter into a rule "not to commit waste or destruction during its pendency," 1823.

On an indictment for perjury *tempore G. 2.* concluding *contra pacem G. 3.* 1903. See *Indictment*.

### Evidence—See Proof.

Of a writ *actually sued out* on a subsequent day may be admitted, to obviate the fictitious relation of a declaration (with a general memorandum) to the first day of the term. 1243.

Mere *bearsay* evidence is not admissible, but evidence that a subscribing witness to a will or instrument acknowledged upon his death-bed to the person giving the evidence, "that he the subscribing witness did himself forge it," is admissible at a trial, though objected to. Much more shall it stand unimpeached, if it came out upon cross-examination, and was not objected to, at the trial. 1255, 1256.

A retainer of a debt may be given in evidence. An administrator defendant may give retainer in evidence, or plead it, at his liberty. 1383.

Action by lord against a commoner, for spoiling his peat, and filling up the holes. Justification under a right of common, which he was hindered, by the plaintiff's digging and laying up the peat, from enjoying in so large and beneficial a manner as, &c. replication—"de injuria sua propria, absque tali causa": and issue thereon. The plaintiff cannot, upon this issue, give in evidence, "that there was a sufficiency of common left." 1385.

Of refusing to produce a licence will support a conviction for trading without

having one; on 9, 10 W. 3. c. 27. § 8. Page 1476, 1477. See *Hawkers and Pedlars*.

To support a declaration in debt on 2 G. 2. c. 24. § 7. for bribery at an election to parliament; charging "that Mr. L. and Ld. E. had declared themselves *several* candidates; and whilst they were candidates, the defendant bribed one W. who had a right to vote, to vote for them, Mr. L. and Lord E."

Three objections were made, and overruled. 1586 to 1591.

1st. It was not sufficiently proved, "that W. had a right to vote, at the time when the bribe was given".

N. B. It was proved, "that he actually voted." *ibid.*

2dly. Nor any evidence "that Ld. E. was at that time, a declared candidate." 1586 to 1591.

3dly. Nor any evidence "that the bribe was given, to vote for Mr. L. and LORD EGMONT:" For the evidence only proved, that it was given, "to vote for Mr. L. and his friend," not particularizing who that friend was. *ibid.*

The court held the material and substantial charge to be sufficiently proved. *ibid.*

### Exceptions—See Bill of Exceptions.

### Executors—

Becoming bankrupt. 1368. See *Bankrupt*. A retainer of a debt may be given in evidence. 1383.

On issue joined upon *plene administravit* pleaded to an action of debt, the defendant administrator may give in evidence a covenant of his intestate, "that his executors or administrators shall pay a sum of money to two trustees, of whom the administrator was one, the interest whereof shall be paid to the intestate's wife for life; and after her death without issue, to be at his own disposal": to which was added a penalty in double the sum. 1380 to 1385.



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1st. This is a *debt by specialty*: and therefore the administrator has a right to retain against a debt of equal nature. Page 1384.

2dly. Wherever an executor or administrator may be *sued*, or *might have paid*, he may retain. *ibid.*

3dly. An action of *covenant* is as much a lien upon the assets, as an action of *debt*. *ibid.*

*Discontinuing* his action, shall pay costs, where he has knowingly brought it wrong. 1451. v. *infra*.

The giving him leave to *discontinue* is a matter of discretion in the court. *ibid.* v. *infra*.

*Renouncing*—qu. if he can afterwards retract his renunciation; especially, if it be upon oath. CIVILIANS hold a renunciation to be *peremptory*; but COMMON LAWYERS hold “that he may come in at any time afterwards, and demand probate; or, at least, any time before it be granted to another.” 1463 to 1467.

Of a lord of a manor—his remedy for a copyhold-fine set upon the admission of an infant. 1719. See *Infant*.

### Exemption—

From being liable to distress. 1499 to 1504.—See *Distress*.

*Fair*. See *Market*, Information in Nature of a *Quo Warranto*.

### Father—

**B**ROUGHT an action for assaulting his daughter, and getting her with child, being then 23, and in another person's service; per quod servitium amisit. 1878 to 1881. See *Action*.

*Feme Covert*—See *Baron and Feme*.

Is liable to be prosecuted and punished for crimes and offences. 1679 to 1682. See *Orders of Bastardy*.

*Sole trader*, in London, becoming bankrupt. Page 1782 to 1784. See *Bankrupt*.

*Fiction of Law*—See *Teste*, Relation, pleading Evidences.

Shall not prevail against truth of fact; nor be urged to purposes not within the reason and policy of it. 1243. 1244. See *Pleading* 950 to 969.

### Fine (of Lands)—

To avoid it, there must be an actual entry. 1897. See *Ejectment*.

### Fines payable to Lords—

On admission of an infant copyholder. 1717 to 1720. See *Infant*.

### Fish—

Preservation of it, in the Thames. See *Water Bailiff*.

### Forcible Entry—

An indictment will lie for it, at common law. 1732.

But such an indictment must shew, upon the face of it, sufficient actual force, violence, unlawful assembly, riot, or other circumstances (as breaking into a dwelling house &c.) otherwise, it may be quashed, even upon motion. 1702. And again 1733.

### Freedom—

Of a corporation—See *Corporation*, By-law, *Mandamus*.

*Game*—See *Conviction*, *Certiorari*, *Costs*.

### General Warrants—

**A**RE illegal. 1767. See *Warrants*, Secretary of State.

*Habeas*

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### Habeas Corpus.

**T**O the keeper of a *private mad-house*—where it appeared, that the person confined was a *lunatic*, and *not fit to be produced in court*; and that the relations were applying for a commission of lunacy—

1st. The court therefore *enlarged* the time for making the return. Page 1363.

2dly. They refused liberty of *access and inspection*, to a person who could not make out any pretension to demand it. *ibid.*

To produce an *infant*—(directed to *private persons*—)

1st. The court are bound, *ex debito jussitiae*, to set the infant *FREE* from an *improper restraint*. 1436.

2dly. But they are *not* bound to deliver over the infant to any body. *ibid.*

3dly. Nor to give the infant any *privilege*: Though the infant has a *privilege redeundo*, unless the court should see ground to declare the contrary. 1436 and 1437.

4thly. The *true rule* is, that the court are to judge upon the *circumstances of the particular case*; and to give their *directions accordingly*. 1437.

5thly. Lord Mansfield approved of what was *actually done* in the three cases of Mrs. Turberville, Frances Howland, and James Smith; though he did *not* agree with all that was said in them. 1435, 1436.

*Ad testificandum*.—

1st. Will lie, to remove a person in *execution*, to be a witness. 1440.

2dly. Was *refused*, where the application for it seemed to be a *mere contrivance*. *ibid.*

*Ad satisfaciendum et recipiendum*—may be returnable *immediate*, and before a judge; notwithstanding an old rule made in Michaelmas 1654, and 4, 5 W. & M. c. 21. 1876. See *Practice*.

### Hawkers, Pedlars, and Petty Chapmen.

The *linen manufacture* of SCOTLAND is the *linen manufacture* of THIS king-

dom, within the act of 9, 10 W. 3. c. 27. and the act of union: And a *wholesale-dealer* in linen of the manufacture of SCOTLAND is *not* obliged to take out a *licence*, to qualify him to trade thus by *wholesale* in ENGLAND. Page 1317.

Only ONE HORSE *licence* is required for travelling with *several* beasts: for though 9, 10 W. 3. c. 27. § 1. intended a duty of 4 *l.* on each beast, yet there is a blunder in the words of it, and the *usage* has followed the words. 1472 to 1474.

A conviction (in the penalty of 12 *l.*) for having traded as &c. “without *“ HAVING a licence,”* is good, upon 9, 10 W. 3. c. 27. § 8. though the evidence stated was only “that the *“ defendant refused to PRODUCE it.”* 1476.

### High-Way.

A *presentment* by a *justice of peace upon view*, pursuant to 5 Eliz. c. 13. § 9. of a high-way being *out of repair*, is *traversable* GENERALLY, *i. e.* including the fact of its being *out of repair*. 1530 to 1532.

### Hundred—

Liable to make *satisfaction and amends* for damages, under 9 G. 1. c. 22. § 7. 1724.

### Identity of Person.

ISSUE joined thereon. 1810 to 1812.

1st. Is to be tried *instantè*, unless the court (upon circumstances) give time. 1811.

2dly. The award of execution is to be by the *second* judge, if the sentence before pronounced was for *felony*. *ibid.*

3dly. The defendant is *not* intitled to a *copy of the record*. *ibid.*

4thly. The court would *not name the day of execution*; but left it to the sheriff. 1812.

Z z 4

5thly



## A Table of the Principal Matters.

gthly. These three men, under sentence of death for felony, having broken out of gaol, after having murdered the gaoler, remained chained together during this whole proceeding. Page 1812.

### Indictment—

For conspiring, falsely and without any probable cause to charge a man with having taken out of a bag (not alledging the taking to have been either felonious or unlawful) a quantity of human hair, &c. 1320.

1st. This is an indictable offence. 1321.

2dly. The general sessions of the peace have jurisdiction of it. *ibid.*

A motion by the prosecutor, "to quash his own indictment," is by no means a motion of course. 1469. See *Costs*.

For converting his house into an hospital for TAKING IN AND DELIVERING lewd, idle, and disorderly UNMARRIED women; who, after their delivery, went away and deserted their children: Whereby the children became chargeable to the parish. Quashed; as being not indictable. 1645, 1646.

For selling, as two chaldron of coals, a quantity defective, by so much, (specifying how much,) of that quantity which a bushel ought by law to contain: was quashed, on motion: It ought to have charged expressly, "that the defendant sold by false measure." 1697, 1698. *V. supra*, 1130.

Will not lie for a mere civil injury: An action for a trespass ought not to be converted into an indictment. It must appear upon the face of the indictment, "that it was an indictable offence:" Such an actual force must appear, as shews a breach of the peace; that which is merely implied by law, under the term *vi et armis* not being sufficient of itself alone. If no such actual force appears upon the face of the indictment, it may be quashed on motion. 1701 to 1703, again 1706, 1707, and again 1731 to 1733.

For a forcible entry—will lie at common law. 1732.

For selling by false weights—(and another, "for selling coals by false measure"—) The court refused to quash it on motion. Page 1841.

Alledging the offence to have been committed in the time of the late king, and charging it to be against the peace of the now king, is fatal; and the indictment is insufficient, 1903.

### Induction.

'Tis induction, not institution, that makes the avoidance under 21 H. 8. c. 13. § 9, 10. with respect to lapses. 1510. See *Benefice*.

### Infant—

Copyholder—Admitted; and a fine set—And the infant enjoys—and continues to enjoy, after he comes of age: He is liable to the lord's action for the fine 1717 to 1720.

1st. *Indebitatus assumpsit* will lie, by the executor of the lord, after the infant comes of age. 1719.

2dly. Perhaps, before. *ibid.*

Conveyance by lease and release by an infant, is only voidable, not absolutely void. 1795 to 1809.

1st. The privilege indulged to an infant, to protect him from being injured, shall never be turned into an offensive weapon of fraud or injustice. 1802.

2dly. Acts of an infant, which do not touch his interest, but take effect from an authority which he is trusted to exercise, shall bind him. *ibid.*

3dly. So shall all right acts which he ought to do, which he was in any way, or through any means compellable to do; though he doth them without suit in law. 1801, 1802.

4thly. There are some acts, which he has, after full age, election either to avoid, or to confirm. 1808.

5thly. He can not bring a *dum fuit infra ætatem*, till after his full age. *ibid.*

6thly.

## A Table of the Principal Matters.

6thly. A discussion of the *true ground* upon which an infant's deed is *voidable only*, and not void: namely, whether the *solemnity of the instrument*; or the *semblance of benefit* to the infant, from the matter of the deed upon the face of it. Page 1804.

7thly. *Leases* by an infant, by deed, upon which *no rent* is reserved, are *voidable only*, not void. 1806.

8thly. A *surrender* by an infant, by deed, is only *voidable*: It has never been directly adjudged to be *void*. Yet it is possible that a case may happen, where it would be more beneficial to the infant "That the deed should be considered as void." 1807.

### Information.

A *joint information* against several defendants can not issue upon distinct rules for one or more information or informations against each. 1271.

*Prosecutor* shall pay *costs*, for not going on to trial. 1305.

Against *justices of peace* for *refusing to grant licences* to publicans—

1st. Shall not be granted, for their *mere refusing*: because they have a discretion to grant or refuse, as they shall see to be right and proper. 1317, 1318. But

2dly. Shall be granted, where such refusal arises from a *corrupt motive*; as, "because the persons applying for licences would not give their votes for members of parliament, as the justices would have had them." *ibid.* V. *supra*, p. 561 to 565; and p. 653, 654.

For a *conspiracy and confederacy* in a transaction *contra bonos mores*, an information undoubtedly lies. 1434 to 1440. And

This court is the *custos morum* of the people; and has the *superintendency* of offences *contra bonos mores*, if you except such offences of the *incontinent*

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kind, as are appropriated to the *ecclesiastical courts*. Page 1438, 1439.

The court will never grant an information, upon the application of the *Attorney General*, in cases prosecuted by the crown. 1565, See *Præfice*, and V. *infra*, accord.

*Criminal informations* differ very widely from informations in nature of *quo warranto*; and depend upon different principles, laws, and reasons. 1615, 1616.

For *obstructing divine service* in the church, and insulting the rector; (who was a favourer of the *Methodists*.) 1683, 1684.

1st. The rule was discharged *with costs*, because the truth was *suppressed*. *ibid.*

2dly. A *licence* from the bishop "to preach," will, in *strictness* (though not always in practice,) authorize the person to preach in that particular bishop's diocese only; and not in any other diocese. *ibid.*

3dly. *Methodists* have a right to the *protection of the court*, if disturbed in their decent and quiet devotions: So have *dissenters*. *ibid.*

Granted against two *justices of peace* for a burrough, for *refusing to grant a licence* to sell ale, from a *motive of resentment*. 1716. V. *ante*, 556 to 555.

### Information in nature of *Quo Warranto*—

Shall be granted, where the right is *doubtful and disputed*, in order to try it; unless there has been such an *acquiescence* as ought to prevent it. 1486, 1487.

No certain rule is fixed for such *acquiescence*: It may be varied by circumstances. *ibid.* V. *infra*.

The line is not drawn and fixed, where the rights of *electors* can be gone into at all, or how far they can be gone into, on trial of the rights of persons elected by them. 1487.

The crown may take what *issues* it thinks proper, in order to shew an *usurpation* of the franchise. *ibid.*



## *A Table of the Principal Matters,*

The *steward of West Loe*, was elected a *capital burgefs*: And, for a century past, the stewards of that corporation have been capital burgeffes. The court refused to grant an information against him, for acting as a capital burgefs; and did not see any reason why these two offices should be incompatible. Page 1615, 1616.

Will lie, for holding a *court-leet*, 1820, 1821.

For holding a *fair or market*—

1st. The king's *Attorney General* may file one, for usurping this franchise upon the crown. 1812 to 1823.

2dly. But "Whether the king's *counsellor and attorney* could have "done it before 4, 5 *W. & M. c.* "18, and 9 *Ann. c. 20*, or can "now do it by leave of the court," is a question that has been greatly litigated, but never settled; and was now left *unsettled*. *ibid*.

3dly. On the present application by a *private* person, it was not necessary to determine "whether it "could be granted upon a *private* "person's application"; because the *usurpation* was not sufficiently shewn. 1821.

4thly. Such an information will *not* lie, for merely *encouraging and promoting* the holding a fair or market. 1816 to 1819.

Inns and Inn-keepers. See *Detainer, Distress*.

Insolvent Debtors. See *Debtors*.

### *Inspection—*

Of *corporation-books*, &c.—See *Books* (of *Corporations* &c.)

Institution and Induction. See *Benefice, Lapse*.

### *Instalments.*

*Bonds* conditioned for payment of money by instalments, are *within* 4, 5

*Ann. c. c. 16. § 13. Page 1370 to 1375. See Practice* (Payment of money into court.)

*Bonds* conditioned for payment of a *gross sum*; and a *subsequent agreement* to take it by instalments. *ibid*. And *V. ut supra*.

### *Insurance. See Policy.*

A society agreed *mutually* to insure the ships of each other; and that when any of the ships wherein any of the members had *property*, should be lost, the rest should *contribute* to such loss. But every member was obliged to prove a *property* of 500*l.* in a ship: And if he would *cease to be a member*, to give *six months notice*. The plaintiff had the requisite property in a ship; became a member; and the ship was lost: But he had *parted with* his interest in the ship, before the loss happened; having agreed with the purchaser of it, "to pay 500*l.* if a loss happened within three months." He had *not given notice* of ceasing to be a member. The court gave judgment for the plaintiff; holding, "That he continued interested in the ship, *quoad* this loss. 1513.

### *Interest.*

If 5*l.* *per cent.* be reserved on a mortgage, with condition "to accept four, "if *punctually paid*;" the debtor shall not have relief in chancery, after the day of payment is elapsed: Otherwise, if 4*l.* *per cent.* be reserved, with an agreement "That if it be "not punctually paid at the day, "the mortgagee shall *pay five*." The former is a condition not performed: The latter is considered as a *penalty added*. 1373 to 1375.

### *Joint-Tenants.*

A joint-tenant can not make a *will* of what he holds in jointure. 1496, 1497.

1st.

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1st. Such will is void, both at common law, and on the statute of wills (34, 35 H. 8. c. 5. § 4.) Page 1496, 1497.

2dly. The jointure can not be severed by a will; as it may be by a feoffment to uses. 1497.

3dly. Such a will made during the jointure can not become a good one, by the devisor's afterwards happening to survive all his joint-companions; unless it be republished or renewed by some confirmatory act. 1497.

4thly. Perkins 96 b. title, "Devises," section 500 denied, in the sense endeavoured to be put upon it; and explained in its true sense. *ibid.*

### Jure—

Joined by the party tendering it, viz. "Et predictus the defendant similiter," instead of "Et predictus the plaintiff similiter," is not a sufficient objection in arrest of judgment. 1793, 1794.

Joined on identity of person. 1810, 1811. See Identity.

### Judges.

Foster's death. 1440, 1441.

Only three during Michaelmas term 1763, 4 G. 3. 1441, 1450.

Rates appointed. 1451.

Denison resigned; Aston succeeded him. 1647.

Denison's death. 1733.

### Judgment—

Upon a warrant of attorney given to a feme sole, who afterwards marries—How to be entered up. 1471. See Baron and Feme.

To what day a judgment shall relate. 1596, 1597. See Common Recovery.

Shall not be lightly arrested, after a verdict. 1725, 1729.

1st. The court will not intend any thing, to overturn a judgment. 1728.

2d. They will, after verdict, overrule an objection, which they would have listened to upon demurrer. Page 1728. See Bailiff.

### Jurisdiction—

Of Justices of the Peace—See Justices of the Peace.

### Juroz—Jury—

May be challenged, if he is under the smallest degree of interest, influence, or bias. 1856 to 1859.

### Justices of the Peace—

Refusing to grant licences. 1317, 1318. V. Information, Licences, and *supra*, (under pa. 556, 564. and 653.)

The quarter-sessions have no jurisdiction (even since 17 G. 2. c. 38. § 4.) to make an original order, in the first instance; without any previous application having been made to two justices (V. 43 Eliz. c. 2. § 4. and § 6.) "for late overseers to pay over monies to their successors." The 17 G. 2. c. 38. makes no alteration in this respect: It had quite another view. 1366, 1367.

Quarter-sessions cannot proceed after the day when their jurisdiction is to cease, by a statute which repeals it: although it was, before that day, fully attached, and all requisites complied with. 1457. See Prisoners.

Quarter-sessions can not make a new scavenger's rate, upon appeal: And Qu. Whether they can make a new poor's rate. 1460. See Rates.

Secretary of State—Qu. Whether he is a justice of the peace, or a conservator of the peace. 1742 to 1768. See Secretary of State.

Landlord—See Rent, Tenant, Statutes.

IF his tenant for life or years, or any claiming under such tenant, willfully holds



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*holds over*, they shall, after demand made and *notice in writing* given, for delivering possession, pay at the rate of *double the YEARLY VALUE*, to be recovered by action of debt &c. &c. by 4 G. 2. c. 28. § 1. Page 1607 to 1609.

If his tenant gives *notice of quitting* at the time therein mentioned, and then *refuse to quit*, he shall pay *double the RENT*; to be *levied*, sued for, or recovered, as the single rent might have been. V. 11 G. 2. c. 19. § 18. 1605.

1st. *This notice* needs not to be in *writing*, as the landlord's is required by 4 G. 2. c. 28. § 1. to be. 1607 to 1609.

2dly. A tenant *from year to year* is within this act; which is *not confined* to such tenants only whose power to determine their leases is *particularly expressed* in their leases. *ibid.*

### Land Tax.

An *office* may *qualify* the officer to *act as a commissioner*; though the officer has *no other qualification* besides his office and what belongs to him in right of it. 1289, 1290. See *Marshall*.

*Lapse*—See *Benefice*—

Is to be *computed*, under 21 H. 8. c. 13. § 9. from the time of *induction* to the second *benefice*; *not* from the time of *institution* to it. 1510, 1511.

### Law.

The law of *nations* is *part* of the law of *England*. 1480 to 1482. See *Ambassador*.

So is the law of *merchants*. 1669 to 1675. See *Merchants*.

### Leases.

A lease may be made, *under a power*, by way of *covenant* to *stand seised*. 1446. See *Powers*.

Cannot be *given in evidence*, without being stamp. Page 1563.

Whether a writing letting or setting a liberty to dig for lead ore, during the whole of the grantor's term, be or not a *lease*, or *what else it is*; see discussed from 1556 to 1564.

*Leet*. See *Court Leet*.

### Licence—

To *sell ale*—*Refusal* of it. 1317, 1318. V. *Information* (under pa. 1317, 1318) and V. *Supra*, 653, 654.

To *preach*—Does *not* extend to other dioceses. 1683, 1684. See *Information*.

*Liberty-Stables*—See *Exemption*, *Disfranch.*

### London.

A *by-law* of the mayor, aldermen, and common council, "That no person " using the trade of a *butcher* there " shall be admitted into the *freedom* " of the city, in any other company " than that of the *BUTCHERS*"—is a good *by-law*. 1323 to 1329.

*Wharfs*, in London. 1408 to 1416. See *Wharfage*.

*Courts of conscience* has a mixed jurisdiction, as well *equitable*, as legal; and proceed *secundum equum et bonum*: And they may proceed against an *attorney*, notwithstanding his serving them with a *writ of privilege*. 1583.

A *custom* in London (as appears in their *litter albus*) is " That where a *feme covert* of a husband useth any craft " in the said city on her sole account, " whereof the husband meddeth no " thing; such woman shall be charged " as a *feme sole*, concerning every " thing that toucheth her craft: And " if the husband and wife shall be " impleaded, the wife shall *plead* as " a *feme sole*: and if she is condemned, " she shall be committed to prison, till " she

## A Table of the Principal Matters.

"she has made satisfaction; and the husband and his goods shall not be charged or impeached." Page 1776, 1777.

1st. Such *feme covert* sole trader is liable to a commission of bankruptcy. 1783, 1784.

2dly. But the commission ought to be confined to matters in the way of her trade. 1784.

3dly. If her husband becomes bankrupt, and afterwards she becomes bankrupt; the husband's assignees can not take her effects: They belong to her assignees. And the question is not between husband and wife; but between his creditors and her creditors. *ibid.*

4thly. Whether the husband has or has not a right, as between him and his wife, to seize her effects, or put a stop to her separate trade in futuro; yet, certainly, neither he nor his assignees can meddle, so as to injure her creditors. 1782 to 1785.

5thly. An action upon this custom can be brought only in London: But the custom may be pleaded in a superior court, by way of defence. 1784.

6thly. This custom doth not interfere with marital rights: It only respects trade and commerce. 1784, 1785.

### Lunatic—

Confined rightly and reasonably, but without any strictly legal authority. See *Habeas Corpus*. 1363.

### Mandamus.

WHERE there is a right to execute an office, perform a service, or exercise a franchise; and the person is kept out of possession or dispossessed, and has no other specific legal remedy, the court ought to assist by mandamus, upon reasons of justice and also of

public policy. Page 1266, 1267 *V. supra*. 1044 to 1047. And *infra*, 1660.

It is a prerogative writ, and was introduced to prevent disorder from a failure of justice and defect of police; *ibid.* and has, of late years, been liberally interposed, for the benefit of the subject and the advancement of justice. 1269.—It has been granted, to admit *lecturers, clerks, sextons, scavengers &c*; to restore an alderman to precedence, an attorney to practice in an inferior court: it ought, since the act of toleration, to be extended to protect an endowed pastor of protestant dissenters. 1267. And accordingly a mandamus was unanimously issued, directed to the trustees under such an endowment, requiring them "to admit Mr. Menas to the use of the pulpit as pastor, being duly elected thereto;" the said trustees, and also Mr. Hanmer the minister or pastor in possession, having positively refused either to try the validity of Menas's election in a feigned issue, or proceed to a new election. 1269, 1270.

To a corporation "to go to election of a corporate officer, in the stead of one against whom judgment of ouster is signed"—*who has a right to move for it; and when*. 1386, 1387. See *Practice*.

To appoint overseers—The court have no power to issue it, but upon the supposition "that the place is a village or township." 1391 to 1393. See *village*.

To admit and swear church-wardens.—the ecclesiastical judge returns *cross-causes depending before himself* contesting the right of election; and that he can not admit and swear them UNTIL it shall have been judicially determined "that they were duly elected." 1421 to 1423. N. B. There were also *cross writs of mandamus*.

1st. This return was adjudged bad; and a peremptory mandamus awarded. *ibid.*

2dly. He ought to obey both writs; for, it is without prejudice to the right of either claimant. 1422, 1423.

3dly.



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3dly. A *mandamus* gives no right.

Page 1423.

4thly. The ecclesiastical judge can not try the validity of the votes. *ibid.*

To the lord *Sec.* of a court-LERT—on 11 G. 1. c. 4. § 3.

1st. The mayor *de facto* ought to have notice, and be made a party to the rule to shew cause. 1453.

2dly. It shall not be granted, unless it appears quite clearly, "that there has been no *due election*." 1454.

*v. post.*, under pa. 2021.

3dly. It must not be too special. *ibid.*

Lies to county justices, to receive and proceed upon a general traverse to a

PRESENTMENT by a justice of peace

UPON VIEW of a highway being out of repair. 1530 to 1532. See Highway.

To restore corporators, was directed to the mayor. The mayor made and

signed, in 1759, a return "that he had restored them." In 1760, he deli-

vered it to their agent; and they acted as in-burgessees, in consequence

of it; but it was never FILED till 1764, about two years AFTER THE

MAYOR'S DEATH, (who died in 1762.) It was moved "that this return should

"be taken off the file." Cause was shewn. But it ended in a rule by con-

sent. 1641 to 1645.

Lies to the keepers of the COMMON SEAL of the UNIVERSITY of Cambridge, com-

manding them to put it to the instrument of appointment of their HIGH-

STEWARD, pursuant to a grace passed in senate. 1648 to 1663.

Resolved

1. The question turns upon the real merits of the election, not upon the declaration of the proctors. *ibid.*

2. If there is a clear right, there must be some remedy. 1659. 1660.

3. A *mandamus* is the proper remedy, because there is no other specific adequate one. *ibid.* *V. supra*, 1045,

1266, 1267.

4. The earl of Hardwicke was regularly elected. 1657 to 1663.

1. The mode of election is good, under a usage of 240 years,

notwithstanding a subsequent charter which seems to pre-

scribe a different mode of elec-

tion. Page 1656 to 1663.

1. A new corporation must take a new charter as it is given;

but a corporation already ex-

isting are not obliged to accept a new charter in toto. They

may act partly, under it, and partly, under their old charter

or prescription. 1656. 1661. 1662.

2. The new charter (of Queen Elizabeth) could not mean to

repeal the old customs and usages of the university, except in

those cases where the university chose it; Per Mr. Justice Wil-

mor. 1661.

3. The corporation of the uni-

versities are LAT-corporations per Lord Mansfield; and the

crown can not take away from them any rights that have been

formerly subsisting in them under old charters or prescriptive

usage. 1656.

4. The franchise of a court leet, though anciently granted to

the town of Cambridge, seems at present to be in the pos-

session of the university. 1660, 1663.

2. Five of Lord Hardwicke's votes, viz. Three resumed graces, and

those of the two 'squire-beadles (who voted in the regent-house;)

were holden good votes. 1658, 1659, 1663.

3. Mr. Pitt's vote against Ld. H. was holden a bad one. 1658,

1662, 1663.

1. He voted in the regent-house; which he ought not

to have done, after his quinquennium was expired. *ibid.*

2. Being made master of arts by royal mandate, his degree

commenced upon its inauguration and before the general commencement. *ibid.* For

3. An honorary graduate, commences at the time of pronouncing the words "incipit

"magister": an ordinary regular graduate, not till the

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the general commencement.

Page 1658, 1662, 1663.

To appoint a parish-clerk. The nomination was in the *rector*: the approbation, in the vestry. The rector nominated. The vestry met. Some signed their approbation, none dissented expressly. But some demanded a poll. This was no *DISSENT*; dissent must be DECLARED. 1878. See *Election*.

### Mariner.

His wages are not payable, if the ship be lost or taken before the end of the voyage. 1845.

And a voyage "to Newfoundland, and thence to Spain, Portugal, or some port in the Mediterranean," was holden to be one entire voyage; and the wages not payable, though the ship had arrived at Newfoundland, and was taken in its voyage from Newfoundland, to the port of delivery of the fish. *ibid*.

### Market—See Fairs.

"Whether an information in nature of "a *quo warranto* will lie, at the application of a private person, for holding them." 1812 to 1823. See *Information in Nature of Quo Warranto*.

### Marshall—

Of the King's Bench—

1. Acts of parliament relating to this office are 8, 9 *W. 3. c. 27.* and 27 *G. 2. c. 17.* 1289.
2. May act as a commissioner of the land tax, under the qualification of his office, though he has no other qualification. 1289, 1290.

### Merchants.

Their law is the law of the land:  
And the court are to judge of it:

not the jury. Page 1699 to 1673.  
See *Bill of Exchange*.

The want of a consideration is no objection, in commercial undertakings or promises. *ibid*. See *Bill of Exchange*.

### Messenger.

A king's messenger defending himself under a secretary of state's warrant, must shew "That he acted in obedience to it." 1767, 1768. See *Secretary of State*.

### Methodists—

If disturbed in their decent and quiet devotions, have a right to the protection of the court: So have dissenters. 1683, 1684. See *Information*.

### Mines.

Coal-mines are rateable to the poor: Lead-mines are not. Coal-mines are specified in 43 *Eliz. c. 2.* And the specifying them excludes other sorts of mines. 1341 to 1345.

### Mortgage.

The proper method of reserving interest, so as to have it punctually paid. 1373 to 1375.—See *Interest*.

### Mutiny Act—

Are intended to guard the civil authority, against the military. 1262.

Are not drawn up with nicety, nor by lawyers. 1262.

Shall be construed equitably and favourably for those who act fairly under them. *ibid*.

A deputy high-constable, appointed by parol only, to do the business of quartering soldiers for his principal during his whole continuance in office, may billet soldiers. *ibid*.

Pew



## A Table of the Principal Matters.

### De novo Trial—

**I**N *ejectment*. Page 1255, 1256. See *Ejectment*.

Not granted, in a *hard case*. 1308.

Granted upon a verdict in favour of the defendants who had undertaken to honour the bill of exchange that the plaintiffs should draw upon them. 1669 to 1675.—See *Bill of Exchange*.

The court, not the jury, are to judge of the law of merchants. *ibid.* And see *Bill of Exchange*.

The court seeing great reason to suspect “that very improper methods had been taken to procure evidence, set aside the verdict, on payment of costs.” *ibid.*

For excessiveness of damages—See *Verdict*.

### Non-Suit.

Judges ought to lean against every attempt to nonsuit a plaintiff upon objections which do not relate to the real merits. 1243, 1244.

### Quodum Prosum.

The notion and idea of it. 1670.

It came into our law, from the civil law. *ibid.*

*Bracton* is the first of our lawyers, that mentions it. *ibid.*

*Plowden* adopts it, and explains it agreeably to the Roman law. 1671.

It was calculated to prevent inconvenience from *hasty inconsiderate promises and undertakings*. *ibid.*

But the objection does not hold, when the undertaking is in writing. 1669 to 1671.

A departure from any right, or a suspension of pursuing it, is sufficient to graft a verbal promise upon. 1669 to 1672.

### Nuisance.

The violation of a public law (1 *Eliz.* c. 17.) is not within the idea of a

nuisance. Page 1770. See *Water Bailiff*.

### Officers.

**A**N officer acting under a warrant of a secretary of state or of a justice of peace, must shew “That he acted in obedience to it.” 1767, 1768.

### Orders—

Appointing overseers for a *will or town-ship*. 1392, 1393. See *Village*.

For overseers to pay over money to their successors. 1366, 1367. See *Justices of Peace*.

On appeal from a *scavenger's rate*, or from a *poor's rate*. 1460. See *Rates*.

For appointing overseers for the respective divisions of large parishes. 1610 to 1615. See *Parish*.

Committing a *rogue and vagabond* to the house of correction under 17 G. 2. c. 5. § 7. 1636. See *Commitment*.

For appointing overseers—made on *Easter-Weensday* 1766, appointing them “for this present year 1766,” is a good order: It plainly means the overseer's year, not the year of our Lord. 1905.

### Orders of Bastardy.

An unmarried woman was ordered by two justices “to maintain her bastard, by paying 8 *d.* a week, so long as it should be chargeable to the parish.” She afterwards married. Then, being married, she was, for disobeying this order, committed to the HOUSE OF CORRECTION; there to remain without bail or mainprize, except she shall put in sufficient surety “to perform the said order, or else personally to appear &c.” Or be otherwise discharged by due course of law. 1679 to 1682.

Resolved—

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### Resolved—

1st. A *feme covert* is liable to be punished for crimes. Page 1679 to 1682.

2dly. Her subsequent marriage does not discharge her. *ibid.*

3dly. There is no need to summon the husband: He is not liable for the criminal conduct of his wife. *ibid.*

4thly. Producing bastards is an offence, a crime, by 18 Eliz. c. 3. expressly. *ibid.*

5thly. Therefore the justices may commit her, either to the county-gaol, or to the house of correction: For, she is within 6 G. 1. c. 19. § 2. *ibid.*

6thly. The adding the words, in the conclusion of the commitment, "Or to be otherwise discharged by due course of law"—is only *nimia cautela*, and *non nocet*. 1682.

### Orders of Removal.

No. 162. John Meredith and Susannah Jenkins were married by banns; and a proper entry was made of it in the register-book of the parish: But neither the minister, parties, or witnesses signed the said entry, pursuant to the directions of 26 G. 2. c. 33. § 14, 15.—The want of signing the entry does not invalidate the marriage: But there ought to be an information granted against the minister for omitting it, if it shall appear clearly "that it was owing to his neglect."

Note—It is not incumbent upon the persons married to prove "that the banns were published." 1317. See my *Settlement-Cases*, pa. 507.

No. 163. John Moes and Elizabeth Mason went together, declaring "They were going to be married;" and returned, declaring, "They had been married;" and they cohabited as man and wife for about thirty years, till Elizabeth's death: Their son, (the pauper) was baptized, and registered as the son of

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John and Elizabeth Moes. On a question, "Whether they were man and wife at the son's birth," the sessions refused to admit John Moes to give evidence "to deny his marriage, and to prove Elizabeth to have had a former husband then living." It was now objected, "That they ought to have admitted him to give evidence of his never having been lawfully married." But Lord Mansfield seemed to think that thirty years cohabitation as man and wife was sufficient proof to the justices, whereupon to found an order of removal of the son. The objection was afterwards given up; and the sessions' order affirmed by consent, on discharging the recognizance. Note—The name of this case (*Rex v. Inhabitants of Stockland*) is omitted at pa. 1330. See my *Settlement Cases*, pa. 509; and No. 9.

No. 164. Philip Warfill bound himself apprentice, by indenture; and inhabited with his master above 40 days in Milford: And falling sick, He, ON ACCOUNT THEREOF, with the consent of his said master, went to his father in Bewley, and there continued 40 days, and was sick all that time. On his going to his father, the said indentures were mutually given up, but not cancelled. Page 1447. See my *Settlement-Cases*, pa. 511, 512.

1st. The 3 & 4 W. & M. c. 11.

§ 7. requires a hired servant to be then unmarried: But sect.

8. does not require that circumstance in an apprentice.

2dly. An inhabitancy by reason of sickness shall not gain a settlement.

3dly. The indenture's being given up, amounts to the same thing as if it had been cancelled. See No. 95.

No. 165. John Milwood, a lad of about 16 or 17, agreed with his father-in-law, a button-maker in Holy Trinity, "to live with him in his house, and to work at his trade,

3 A

" and



### A Table of the Principal Matters.

"and to be paid at the rate of  
"ONE PENNY PER GROSS for the  
"buttons he should make (being  
"the same wages as the father-  
"in-law paid to the other workmen  
"he employed,) deducting at the  
"rate of 5s. a week for his  
"meat, drink, washing, and lodg-  
"ing." This is not a hiring for  
a year, either express or implied;  
nor like any of the cases where  
there was a hiring for a year.  
This is the case of a workman  
hired to work by the PIECE. In-  
deed, hiring in general and indefi-  
nitely gives a presumption of a hiring  
for a year, where the nature of the  
service and subsequent facts concur  
to render it probable that it was so  
meant. Page 1448. See my *Settle-  
ment-Cases*, pa. 513. See also No.  
52, No. 98, No. 146, No. 157,  
and No. 160.

No. 166. *Peter White*, being settled in  
*Over-Norton*, purchased a tenement  
in *Salford*, for 29*l.* and lived in  
it 36 years, and continued to live  
in it: And his son, *Peter White*  
the younger (the pauper) was born  
in it, and lived with his father as  
part of his family till eight years  
ago, when he married and left it,  
and lived separate, but never  
gained any settlement but what he  
DERIVED from his father. Two  
justices removed the son from *Sal-  
ford* to *Over-Norton*: The sessions  
quash that order. This court  
quash the order of sessions, and  
affirm the original order. 1452.  
See my *Settlement-Cases*, pa. 516.

1st. The father gained no settle-  
ment in *Salford*, by this pur-  
chase; but was barely irre-  
moveable from thence, so long  
as he inhabited his purchase;  
in the same manner as if 9  
G. 1. c. 7. (§ 5.) had never  
been made. And this was  
only temporary, and did not  
extinguish his settlement at  
*Over-Norton*. See No. 40,  
No. 42, No. 82, No. 110.

2dly. The only settlement there-  
fore which the son could de-

rive from his father, was at  
*Over-Norton*: For, the father  
having no settlement at *Salford*,  
could communicate none to his  
son there; not even during  
the time of his residence upon  
it.

No. 167. *William Merrick* (the pauper)  
was procured by Mr. Bayly to  
serve the office of constable of the  
tithing of *Hambrook* in the parish  
of *Winterton* in Mr. Bayly's *stead*,  
in order to gain the pauper a set-  
tlement in *Winterton*. He was  
accordingly sworn into the office be-  
fore a justice of peace, and served  
it for the whole year; during  
which time he lived in the said  
tithing: But he never was PRE-  
SENTED thereto at any court-leet,  
as constable in his own right. The  
custom has been, time out of mind,  
"to PRESENT all constables to serve  
"for the said tithing, at the said  
"court-leet." The pauper did not  
gain a settlement at *Winterton*:  
For he never was PRESENTED to  
the office at any court-leet, as  
constable in his own right; which  
the custom requires. (See 3, 4,  
W. & M. c. 11. § 6.) Page  
1458. See my *Settlement-Cases*,  
pa. 520.

No. 168. *James Bowden*, the pauper,  
took a house in *Gorton*, at 3*l.* 10*s.*  
rent per annum, and the LANDLORD  
was to PAY all *leys and taxes* ex-  
cept the window-tax; and did pay  
them for several years: But in the  
last year, he directed the overseer  
to call upon his tenant *Bowden* for  
a quarter's poor-ley and a church-  
ley, and to tell him "That he  
"(his land-lord) ordered him to  
"pay it, and would ALLOW it out  
"of his rent." The overseer hav-  
ing done this, *Bowden* paid both,  
DECLARING "he paid them FOR  
"his landlord." and the overseer  
said "he ACCEPTED them accord-  
"ingly." But the landlord, not  
being asked by the tenant to allow  
it, did not allow it out of the rent  
till long after the tenant left the  
estate (six days before the order of  
removal.)

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removal.) In the assessments, the charge in respect of the tenement was "*Bowden's*." The pauper gained a settlement in Gorton. Page 1477. See my *Settlement-Cases*, pa. 522. See also No. 3; No. 22, No. 132, No. 183, No. 148, No. 155.

No. 169. *Joseph Howe* took a tenement of 10 *l. per annum* at *Blackfordby*, and resided upon it about three months. He afterwards took two tenements of 15 *l. per annum* and 5 *l. per annum*, at *Leeds*. His wife and family resided wholly at *Blackfordby*, and never came to *Leeds*. He was sometimes at one; sometimes, at the other; and afterwards resided about five months constantly at *Leeds*; and after this, seven and twenty days at *Blackfordby*. His wife and children being likely to be come chargeable to *Blackfordby*, two justices, on complaint thereof, removed them to *Leeds*; and the sessions confirmed this order. But this court quashed both: For *Joseph Howe* himself could not have been removed from his own tenement at *Blackfordby*, whilst his interest in it was subsisting; and consequently the justices could not remove his wife and children from thence, whilst it remained his. 1484. See my *Settlement-Cases*, pa. 524.

No. 170. *John Hamer* was bound apprentice to *Oldham* of *Castleton*, certificated to *Castleton* from *Middleton*; and served his master some years in *Castleton*; and then removed with his master into *Spotland*; and served him there 40 days. He then married; and till the expiration of his apprenticeship, which was upwards of half a year, worked daily with his master in *Spotland*, but lodged with his wife, at her parent's house at *Castleton*. 1641. See my *Settlement-Cases*, page 527.

1st. He gained no settlement in *Castleton*. *V. ut supra*, No. 54, No. 119, No. 122, No.

125, No. 130, No. 171, No. 183.

2dly. It having been admitted "that he gained one in *Spotland*."

3dly. He is to be sent to this intermediately gained settlement of *Spotland*, and not to his former settlement which he had prior to his being bound apprentice. (*V. 12 Ann. stat. 1. c. 18. § 2.*)

No. 171. *James Capon* was by indenture bound apprentice to *John Miller* of *Bridport*, then owner of a ship, for seven years, to learn navigation and the art of a sailor. He entered on board the ship; and did there serve him as such apprentice, during the said term. The ship was employed in a coasting trade from *Bridport* harbour. And *BRIDPORT HARBOUR* was and was considered as the proper home of the ship. One time of its arrival at *Bridport* harbour, the said *James Capon*, (the pauper) resided, lodged, and served his said master as his apprentice, on board the said ship, for above 40 days. *BRIDPORT HARBOUR* is a basin within the parish of *BURTON BRADSTOCK*: It was made about 20 years ago, in pursuance of an act of parliament (11 G. 2.) on a piece of land lying within the said parish; and a cut was made, to let the sea up to it; through which cut, ships sail to the basin. The apprentice is clearly settled in *BURTON BRADSTOCK*. (*V. 3 & 4 W. & M. c. 11. § 8.*) Page 1694. See my *Settlement-Cases*, pa. 531. See also No. 170, No. 183.

No. 172. *William Gilbert* was settled at *Uttoxeter*. His mother rented and resided upon a farm of 22 *l. per annum* in *Marshington-Woodlands*. She devised it to her five children; made the pauper and her three other sons her executors; and died. The pauper alone proved the will; and entered as her executor; and managed and



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RESIDED upon the farm for 12 or 13 weeks. The pauper gained a settlement at Marchington Woodlands. Page 1725. See my *Settlement-Cases*, pa. 538.

1st. A SHARE not amounting to 10 l. per annum in value, of a tenement upwards of 10 l. a year in value, is not sufficient to gain a settlement. *V. ut supra*, No. 111.

2dly. But this man has a right as EXECUTOR: And then the VALUE is immaterial; because a man can NOT be removed from his OWN, though of ever so little value, when the interest DEVOLVES upon him by act of law. *V. ut supra*, No. 40, No. 110.

3dly. Persons who have interests by act of law are not within the purview of 13, 14 C. 2. c. 12. *V. ut supra*, No. 40, No. 110.

4thly. A person who has an interest in a tenement of ever so little value, by act of law, being IRREMOVABLE, does thereby gain a settlement, IF he resides 40 days. *V. ut supra*, No. 40, No. 110.

No. 173. John Gay, being 22 years of age, agreed with William Burridge, a stone-mason of Wotton-Fitz-Payne "to be taken as his apprentice in that trade, for six years &c. and that indentures should be executed between them accordingly." But NO such INDENTURES ever were executed. Yet Gay worked for him as an apprentice, in his trade, above five years, in Wotton-Fitz-Payne. He gained no settlement there, either as an apprentice or as a hired servant. 1729. See my *Settlement-Cases*, pa. 540. See also No. 95, and No. 157.

No. 174. William Hutchins was bound apprentice by his parish, to serve till 24 years of age; and served four years in St. Luke's. Then his master told him "to go about his business, and work for himself;"

but the indentures were NOT cancelled or delivered up. The apprentice thereupon hired himself to several masters in different parishes, as a journey-man: And the master never afterward concerned himself about him. He worked and lodged the last forty days before he attained 24 years of age, in St. Leonard's. His settlement is in St. Luke's. The indenture continued: And the service in St. Leonard's can not be considered as a service of his first master or an assignment. Page 1731. See my *Settlement-Cases*, pa. 542. See also, No. 91, No. 95, and No. 186.

No. 175. Anne Kellett, single woman, hired herself from Whitsuntide 1763, to John Thompson of Croftbwaite and Lythe, to serve him till Whitsuntide 1764. The method of hiring from Whitsuntide to Whitsuntide is stated to be the usual course of hiring servants by the year, in that county (Westmorland.) She served him till Martinmas 1763, and then QUITTED his service. At Christmas 1763, she hired herself to the said John Thompson, to serve him at Croftbwaite and Lythe till Whitsuntide 1764. At Whitsuntide 1764, she hired herself to him for one year, to serve him from that time till Whitsuntide 1765, at Croftbwaite and Lythe. She continued in her said master's service at Croftbwaite and Lythe, under the said hirings, from the beginning of January 1764 till the beginning of March 1765; and then quitted his service, being lame and not able to serve any longer. Her legal settlement is at Croftbwaite and Lythe. 1824. See my *Settlement-Cases*, pa. 545.

1. It has been fully settled  
 " That a subsequent SERVICE  
 " for LESS than a year, per-  
 " formed under a hiring for  
 " a WHOLE year, may be  
 " COUPLED with a PRIOR  
 " service performed under a  
 " hiring which was for less  
 " than a year, and shall gain  
 " a settle-

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"a settlement; provided  
"there be (upon the whole)  
"both a hiring for a year and  
"a service for a year." *V.*  
*at supra*, No. 98, 2d divi-  
sion.

zdy. And though Dr. Burn was  
of a different sentiment, and  
had urged sensible and strong  
arguments in support of his  
opinion, which might have  
carried great force if it had  
been *res integra*; yet the court  
unanimously held it best  
"*stare decisis*," and not to  
overtune settled determinations:  
And upon that principle, they  
quashed the order made at a  
quarter-sessions where he pre-  
sided, and where the justices  
were of opinion "that the  
"said *Anne Kellet* gained no  
"settlement in *Croftswaite*  
"and *Lytbe*." *V. infra*, No.  
176, second division.

No. 176. *Jane Moore* was sent, to-  
gether with *George Wise*, by an order  
of removal, from *Newburn* to *En-  
born*, by the name of *George Wise*  
and *Jane* his wife: From which  
order there was no appeal. After-  
wards, *Enborn*, finding that she  
was not *Wise's* wife, obtained an  
order to remove her to *Silchester*,  
by the name of *Jane Moor*, SINGLE-  
WOMAN. *Silchester* appeared; and  
proved "that the never was mar-  
"ried to *Wise*." Whereupon the  
sessions confirmed the order last  
mentioned. But this court quashed  
both. Page 1840. See my *Settle-  
ment-Cases*, page 551.

1st. It is a settled point, "That  
"an order of removal to a  
"parish, not appealed from,  
"concludes that parish against  
"all the world." *V. at su-  
pra*, No. 67.

2dly. "*Stare decisis*" is always  
a good rule; but never more  
so, than in cases of settlements  
of paupers. *V. supra*, No.  
175 (the last preceding case)  
2d division.

No. 177. Two justices removed *Eliza-  
beth Tansur*, widow, from *South  
Kilworth* to *Dun-church*. On ap-  
peal, it appeared to the sessions, by  
PAROL evidence of the pauper and  
her son, that the pauper's husband,  
*Edward Tansur*, being duly certifi-  
cated from *Dun-church* to *South Kil-  
worth*, and residing there with his  
wife and family, she and her said  
husband were joint purchasers of a  
house, yard, and garden-place  
there; and PAID for the purchase  
thereof, nineteen pounds and up-  
ward; and then HE LAID OUT  
about fifteen pounds MORE to put it  
in repair; and built a new shop on  
part of the premises; and was  
taxed after the rate of thirty pounds  
value; and resided on the premis-  
ses till his death: After which, his  
widow (the pauper) continued in  
possession, for about ten months.  
Then she went to service for five  
years, and let it. Then she re-  
turned to it, about three years ago;  
And soon sold the garden-place, for  
20*l.* 3*s.* 6*d.* and by deed of gift  
gave to her son part of the yard.  
She, by indentures of feoffment,  
granted the residue to her son *Ed-  
ward* and his heirs, to the use of  
her self for life, at to the parlour,  
chamber over it, and pantry; with  
remainder to *Edward*, in fee: And  
as to the residue, to the use of  
*Edward*, in fee. And *Edward* co-  
venanted to keep the whole in re-  
pair. The pauper continued to  
dwell in the same parish: and LET  
her own to her son, for sixpence;  
and was relieved, at her daughter's;  
and was then removed, by the said  
order, to *Dun-church*. The sessions  
confirmed that order. This court  
affirmed both orders: For, she must  
be considered as a purchaser; and  
the purchase is within 9 *G.* 1. c.  
7. § 5. Page 1859. See my *Set-  
tlement-Cases*, pa. 553.

1st. The value of the purchase  
must be estimated by the PRICE  
*bonâ fide*, PAID for it. SUBSE-  
QUENT IMPROVEMENTS CAN



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not be considered with a *retrospect*: They can not make the *prior purchase* to have been of greater value at the time when it was made.

2dly. This pauper became an object of removal, as soon as she went out of her house and let it to her son.

No. 178. *William Harrison* took part of a farm at *Ulescroft*, from 29th of May to Lady-Day following, under payment of 26 guineas; and to pay half the poors levies, and do half the repairs. He entered on 1st or 2d of June; occupied till Lady-Day; and paid the 26 guineas, upon a distress taken for it. This was given up, and acknowledged to be a settlement in *Ulescroft*. Note—The name of this case (*Rex v. Inhabitants of Staunton under Bardon*) is omitted at pa. 1865. See my *Settlement-Cases*, page 558.

No. 179. *Richard Speddy* and *Rose* his wife came with a certificate from *Ingleton* to *Astwick*. Her father, in consideration of natural love and affection, conveyed a customary cottage in *Astwick* to the use of the said *Rose* for life; and after her decease, of *Jane*, her daughter, in fee. *Richard* and *Rose* entered, and continued sixteen years in possession: And then *Richard* purchased *Jane's* remainder in fee, for five pounds; and was admitted tenant thereof; and continued in possession thereof, eight or nine years; when they sold the same for 20 guineas. A little before this sale, *Rose's* aunt, in consideration of natural love and affection, conveyed a moiety of another customary tenement in *Astwick*, of four pounds per annum value, to *Richard* and *Rose* during their lives, and afterwards, to *Thomas* their son, in fee; and the other moiety, to *Jane* in fee. *Richard* and *Rose* entered, and have resided in the said tenement ever since, and continued to do so at the time of

their being removed: But they very lately conveyed their moiety in the last mentioned tenement, in consideration of ten pounds, to *Thomas* (who lives with them in the same house.) Since this conveyance to *Thomas*, *Richard* and *Rose* became actually chargeable to *Astwick*. The sessions were of opinion "That *Richard* and *Rose* gained no settlement in *Astwick*:" And they therefore confirmed the order which removed them from *Astwick* to *Ingleton*. But the counsel for *Astwick* gave them up, as *indefensible*, upon the authority of the case of *Kentisbury and Marwood*, Hil. 1756. 29 G. 2. being a voluntary settlement, not a purchase within 9 G. 1. c. 7. § 5: And both orders were quashed. Page 1877. See my *Settlement-Cases*, pa. 560. See also No. 124 and below No. 182.

No. 180. *Samuel Wilshaw* was, at sixteen, bound out by his parish, (pursuant to 43 Eliz. c. 2. § 5.) apprentice to a master in *Ecclesall-Bierlow*, for eight years; and served five of them there. After he arrived at one and twenty, he and his MASTER agreed to CANCEL the indentures: And the master delivered up his indentures; and they were CANCELLED accordingly. The pauper (*Wilshaw*) was afterwards hired for a year and served for a year in *Warslow*. He gained a settlement in *Warslow*: For, the apprentice, when of the age of 21, and his master, may dissolve the contract; and it is not necessary that the parish-officers should consent to discharge him. 1905. See my *Settlement-Cases*, pa. 562.

No. 181. *Richard Stent* was hired for a year to *William Prangley* of *King's Weston*; and served him there TILL within TEN DAYS of the end of the year; and then declaring to his master "That he wished NOT to be settled in *King's Weston*," he asked his master's leave "to go and visit his relations;" To which, the

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the master consented. The court held him settled in *King's Weston*; looking upon this leave and consent as fraud and mere evasion. Page 1920. See my *Settlement-Cases*, p. 565.

No. 182. *Theophilus Evans*, settled in *Ilmington*, married *Elizabeth Stanley*, spinster; who had before purchased a leasehold tenement in *Mickleton*, for six pounds, for the remainder of a term of 1000 years; and who had resided in it for nine years before her intermarriage with him. AFTER their intermarriage, they both resided in it for sixteen years. Then he died; leaving her surviving. She continued to reside in it, till she sold it for six pounds: AFTER which she was removed from *Mickleton* to *Ilmington*; and the order was confirmed at sessions. But this court quashed both orders: For the wife's estate veiled in the husband on the marriage; and he gained a settlement in *Mickleton*, by 40 days residence on his own; and his settlement communicated itself to his wife. 1921. See my *Settlement-Cases*, p. 566. See also, No. 124, and No. 179.

### Organ.

The consent of the parish is not necessary to the ordinary or the ecclesiastical court's ordering an organ to be erected in the church. 1691, 1692.

But the parish can not be charged with the expence of it, or with the repair of it, or with any new ornaments, without their consent. *ibid.*

### Overseer.

The 17 G. 2. c. 38. § 4. does not give power of applying to the quarter-sessions, in the first instance, to make an original order upon late overseers "to pay over monies to their successors": A previous application to two justices, pursuant to 43 Eliz. c. 2. § 4 and § 6. still remains as necessary

as before 17 G. 2. c. 38. Page 1366, 1367. See *Justices of Peace*.

For a will or township—Order quashed, because the place was not so. 1392, 1393. See *Village*.

For vills or townships in large parishes, 1610 to 1615. See *Parish*.

An order made on *Easter Wednesday* 1766, appointing them "for this present year 1766," is a good order; it plainly means the overseer's year, and not the year of our Lord. 1905.

### Outlawry—

Can not be reversed, without giving such bail as the law requires, 1484. *V. infra.*

Process of outlawry is not within 12 G. 1. c. 29. *ibid.*

Special bail must be put in, upon appearing to an outlawry, where the case originally required special bail: For the defendant shall not gain an advantage by standing out to an outlawry. 1920.

### Pannel—

IS liable to be challenged, where 'tis arrayed by a sheriff who has the smallest degree of interest, or is under the least influence or bias. 1856 to 1858.

### Parish—

So large as that it can not reap the benefit of 43 Eliz. c. 2. may, by 13, 14 C. 2. c. 12. § 21, be divided into townships or villages, maintaining each their own poor, and having their own respective overseers. 1611 to 1613.

But no such division can be made, unless it appears, "That they are under an inability to reap the benefit of 43 Eliz." 1614, 1615.



## A Table of the Principal Matters.

An order of sessions made for it, without this essential foundation, is a nullity. Page 1614, 1615.  
Acquiescence under it, and subsequent usage for upwards of 40 years, can not vary the right. *ibid.*

### Parliament—

Election to it. See Election, Bribery.

Parole,—See Writing.

### Pauper.

PROSECUTORS of indictments shall not be admitted to prosecute in forma pauperis, unless upon some special ground. 1308.

### Penalty.

Upon articles with a penalty, if the party injured chooses the rigorous remedy of proceeding for the penalty, he can not repeat it: It extends to all that he can be intitled to for every breach, and puts a total end to the contract between the parties. 1352. See Action.

### Plea.

A false plea, pleaded by a bankrupt. 1369. See Bankrupt.

A dilatory plea to an indictment was set aside, for want of an affidavit to verify it. 1618.

“Non est factum” may be pleaded to the deed of a *feme covert*; not to the deed of an infant. 1805. See Deeds.

### Pleading—

In debt, for a penalty on 2 G. 2. c. 24. § 7. for unlawfully corrupting voters at an election to parliament, The defendant pleads, in abatement, an action brought against him by another person, in the same term, for the same offence. This is a bad plea. 1423 to 1432.

1st. He ought to have shewn, That the right of action was ATTACHED in some other person, before the present plaintiff's action was commenced. Page 1433.

2dly. If it was in the same term, the plea should have been “That the plaintiff's bill or information was exhibited on such a day; and that at another day before that day, in the same term, another &c.” For, where the priority of action becomes essential and necessary to be ascertained, the particular day must be shewn. *ibid.*

3dly. There is no reason for the distinction (alleged to be taken in *Jackson, qui tam, v. Gifling*.) between pleas in bar and pleas in abatement: For, in both cases, it is equally necessary to set out the particular day. *ibid.*

4thly. If two informations are, in fact, exhibited on the same day, perhaps either may be pleadable to the other; and the defendant may not be obliged to answer to either. 1427, 1428, 1431, 1434.

In cases of copyholds differs from pleading in cases of freeholds. 1537, 1543, 1544.

Where and how a grant may be pleaded or traversed. *ibid.*

A grant, and a scoffment, materially differ, in this respect. *ibid.*

Non concessit puts the operation of a grant in question. *ibid.*

Upon actions brought by sheriffs, upon their bailiff's security-bonds: The proper method of it discussed and settled. 1725 to 1729.

In debt upon an arbitration-bond—The defendant pleaded “No award made on or before 21st May” (the time limited) The plaintiff replies, “That the arbitrators, after the making of the arbitration-bond, and before the exhibiting his bill, to wit, on the 21st of May, did make an award.” The defendant demurred specially, and shewed for cause “That the time of making the award, is not alleged with sufficient certainty;”

## A Table of the Principal Matters.

It only comes out under a *wide-  
" licet."* But *Cur.* held it to be suffi-  
ciently alledged. Page 1730.  
In joining issue, the plaintiff says—" *et*  
" the defendant *similiter*," instead  
of " *et* the plaintiff *similiter*;" judg-  
ment shall not be arrested for this.  
1793; 1794.

**Pluralities.** See *Benefice*.

### Policy of Insurance.

On a ship at 5 guineas *per cent.* at and  
from London to Halifax in Nova Sco-  
tia; warranted to depart with con-  
voy from Portsmouth, for the voyage,  
that is to say the Halifax or Louif-  
burgh convoy. Before the ship's ar-  
rival at Portsmouth, the convoy was  
gone. It was found " That the usual  
" settled premium from London to  
" Portsmouth is  $1\frac{1}{2}$  per cent;" and  
" that it is usual, in like cases,  
" to return part of the premium."  
Judgment for the plaintiff unanim-  
ously. 1241. For

1st. These contracts, are to be ta-  
ken with latitude and according  
to their intention. 1240.

2. If the *risque* is not run, the in-  
surer shall not retain the pre-  
mium; even though it happen  
by the neglect or fault of the in-  
sured. *ibid.*

3. Yet if the *risque* be once begun,  
the insured can not go back.  
1241.

4. Here, the voyage was in its na-  
ture divisible into two parts.  
As to the latter, the contract  
was without any consideration, as  
the *risque* never took place at all.  
Therefore that proportion of the  
premium must be returned. *ibid.*

" Whether the PREMIUM shall be re-  
" turned, or be retained by the insurer,  
" where the insurance is found frau-  
" dulent"—was discussed, but not de-  
termined: For, the insurer had  
brought the money into court; or,  
at least done what was considered as  
equivalent to it. 1361, 1362.

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RESPONDENTIA and BOTTOMARE in-  
terests must be expressly mentioned and  
specified in the policy. But the court  
did not thereby mean to determine  
generally, " that no special interest  
" in goods may be given in evidence  
" in other cases, if the circumstances of  
" the cases shall admit of it."

Page 1401.

The act of 19 G. 2. c. 37. never meant  
to make any alteration in the man-  
ner of insurances. Its view was, to  
prevent *wagering* or *gaming* policies,  
where the insurer had no interest at  
all. 1400.

Subscribed thus—" Warranted neutral  
ship and property"—But, in fact,  
she was NOT neutral property, as war-  
ranted by the policy. The insurer,  
being sued, paid the premium into  
court; and had judgment. For, this  
was NO contract. 1420.

Concealment of a material circumstance  
renders the whole contract void.  
1477. See below 1909.

Free from average (as to corn and fish;)  
UNLESS general, or the ship be  
stranded. These words are not a con-  
dition, but an exception. The insurer  
is liable to all losses arising from  
the ship's being stranded, and in all  
cases where there is a general ave-  
rage. But all other partial losses are  
excluded. The words " free from  
average, unless general," can never  
mean to leave the insurers liable to  
any particular average. 1550 to  
1556.

Upon East India ships—includes the  
chance of their being detained in In-  
dia, and the *risque* of the country  
voyages there. 1707 to 1715.

Concealment—A full and complete de-  
finition of it. 1909, 1910.

1st. What degree of it shall avoid a  
policy. 1909 to 1919.

2dly. The reason of the rule which  
obliges both parties to disclose  
and not deceive, is to prevent  
fraud and encourage good faith.  
1911. 1918.

3dly. The question must always  
be, whether there was, under  
all the circumstances, at the

3 A 5

time



## A Table of the Principal Matters.

time of underwriting, a fair representation; or a concealment; fraudulent if designed, or (though not designed) varying materially the object of the policy, or changing the risk understood to be run. Page 1911.

4thly. What needs not to be disclosed. 1910, 1911, 1916, 1917, 1918.

5thly. A policy made for the benefit of an East India governor (of Fort Marlborough) is not void upon the principle which does not allow a sailor to insure his wages. 1912.

### Post-Duties—

How they arise; and what is the consideration of them. 1402 to 1407. See Declaration, Toll.

### Powers—

To make leases for years, determinable on lives—

1st. May be executed by a covenant "to stand seised." 1446.

2dly. And though it be by way of provision for a younger child, yet that is no objection to it. *ibid.*

Powers are derived from equity; and ought, even at law, to be construed equitably. *ibid.*

**Practice.** See Process, Proceedings, Declaration, Pleading, Repleader.

A joint information may not issue upon several distinct rules for one or more information or informations against each defendant. 1271.

**Bails SURRENDERING their principal—**

It is right and necessary to adhere strictly to the established rules relating to the time and manner of it. 1360. See Bail.

IN TROVER, the specific thing demanded may, in some cases, be brought into court or delivered to the plaintiff, and

costs paid him to the day of the motion; and thereupon, further proceedings be stayed: Yet he may still proceed for more, at the peril of costs. In other cases, this may not be done. Page 1364, 1365.

The distinction is this—

1st. Where trover is brought for a specific chattel of an ascertained quantity and quality, and unattended with any circumstance that can enhance the damages above the real value, but its real and ascertained value must be the sole measure of the damages, such specific thing demanded may be brought into court. 1364.

2dly. Where there is an uncertainty either as to the quantity or quality of the thing demanded; or any tort accompanying it, that may enhance the damages above the real value of the thing; and there is no rule whereby to estimate the additional value; it shall not be brought in. *ibid.*

Payment of money into court, on 4, 5 Ann. c. 16. § 13.—

1st. This act ought to have a most liberal construction: And the courts of law and equity ought to exercise their own authority to extend the spirit and reason of it. It meant that in cases of penalties by way of security, the clear final justice of the case should be attained in the courts of law. 1373, 1374.

2dly. The just intent of a bond is, to secure principal, interest and costs by a penalty; and suffer the debtor, at any time, to save the forfeiture, by performing the intent. *ibid.*

3dly. Bonds conditioned for payment of money by instalments are within this act. *ibid.*

4thly. But if a bond is conditioned for payment of a gross sum at a certain fixed day; and by a subsequent agreement, the debtor is allowed to pay it by instalments, provided that he pay it punctually;

## A Table of the Principal Matters.

*punctually*; otherwise, the agreement and defeasance to be void; If the debtor does not pay it *punctually*, they are void; and the *gross sum* is due to the obligee. Page 1374.

And unless the debtor pays the whole money, he can not be relieved from the penalty. 1374.

5thly. The acceptance of interest up beyond the time of the unpaid instalment is no waiver: For, the obligee was intitled to receive it, as part of the original debt secured by the bond.

1375.

A *mandamus* "to go to election, upon a judgment of ouster"—

1st. Can not be moved for, till judgment be *actually signed*. 1386.

2dly. The prosecutor, who only *stayed* till his judgment was signed, shall not lose his motion which he was quite prepared to make, by another person's employing a counsel who had *pre-audience* before the prosecutor's counsel, in order to get *priority*. *ibid.* and 1387.

A plaintiff ought to give the defendant an account of the particulars of his demand. 1390.

A defendant was arrested within two days of the end of Easter term, by virtue of a writ taken out four days before the end of the same Easter term: and remained in custody of the sheriff till after the end of Trinity term following, without being charged with any declaration.

1st. He was discharged out of the custody of the sheriff, on filing common bail. 1450.

2dly. There is no difference (per Lord Mansfield) between his being in custody of the sheriff, and his being in custody of the marshal. *ibid.*

But it does not follow that "because a declaration must be filed before the end of a second term," that therefore notice to plead must be given within the same limits: For notice to

plead may be good, though only given a little before the *effoin-day* of the following term. Page 1452.

A month's time to plead—means a lunar month. 1455.

And so in all legal proceedings, a month means four weeks: But in *quare impedit*, six months means half a year. *ibid.*

Temporal law understands them to be lunar: Ecclesiastical law, calendar. *ibid.* and 1456.

Concerning putting off trials. 1514 to 1516. See Trial.

The court will never grant an information, upon the application of the attorney general, in cases prosecuted by the crown; because he has that right in himself, and may summon the parties to shew cause, if he thinks proper. 1565. *v. infra. acc.*

Proceedings have been stayed, where it appears upon the face of the declaration, "That the cause of action is *infra dignitatem curie*" (as for 20 shillings only:). But this ought not to be done upon the mere affidavit of the defendant; for, the court can not try the quantum, upon affidavit. 1592.

An objection to an omission in the *plea-roll* comes too late, after the defendant has accepted the issue and paid for it. 1682, 1683.

A *scire facias* against bail must lie four days in the office, before the return: A *scire facias* in error needs not do so. 1723.

Payment of money into court—The court of C. B. have lately altered their practice, and made it conformable to the practice of B. R. (*viz.* to strike so much out of the declaration) 1773. *V. supra, sub 1120.*

PERSONAL appearance of a defendant convicted of a misdemeanor ought not to be dispensed with, (upon his clerk in court's undertaking for the fine,) unless it be clear "That the punishment will not be corporal, but only pecuniary"; and not in every case even of that kind. 1787.

A defendant in custody must be charged with a declaration before the end of the second term after his imprisonment:



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ment: Else, he may be discharged, on filing common bail &c. Page 1787, 1788. And the time runs from notice of his being in custody. *ibid.*

**SURRENDER** in discharge of bail equally intitles to being so *superfedeable*, as if the person had been taken, and had remained two terms in custody after being taken, and the plaintiff had neglected to declare. *ibid.*

A *real fair demurrer* is within the terms of a judge's order for pleading an *issuable* plea: A *sham demurrer* is only an evasion of it. 1788, 1789.

On a writ of error—one alone can not bring a writ of error, on a judgment against several. 1791, 1792.

But one only of two executors who have recovered, may, upon a writ of error to reverse their judgment, have a *scire facias quare executionem non*, without shewing "that the other executor is dead." *ibid.*

On a *scire facias*, no damages can be recovered. *ibid.*

The presence of an attorney for the defendant, upon confessing judgment, is necessary where the defendant is in custody at that same plaintiff's suit: But the rule does not extend to warrants of attorney to confess judgments in other actions. 1793.

Issue tendered by the defendant; and the plaintiff joins issue—"Et predict." "the defendant *similiter*," instead of "et predict. the plaintiff *similiter*." This was objected, in arrest of judgment: But the objection was overruled, and the judgment established. 1793, 1794.

A prisoner is intitled to be discharged out of custody of the marshal, if a *committitur* be not actually entered on record before the end of the second term. An entry in the marshal's book is not sufficient. 1841.

The court refused to *quash*, UPON MOTION, an indictment for selling by false weights. 1841.

A general rule was now established (H. 1766, 6 G. 3.) "That all enlarged rules to a subsequent term should be fixed to certain days in such sub-

sequent term; viz. five, for the first day; five, for the second; and so on; And lists to be hung up in the offices; and copies thereof given to the judges the day before the beginning of every term."

Pages 1842, 1843, 1844.

A **HABEAS CORPUS** cum causa, ad faciendum, et recipiendum, directed to a gaoler of an out-county, may be returnable before a judge, and immediately; notwithstanding an old disused rule of Michaelmas 1654; and notwithstanding the plaintiff's having already declared against the defendant in custody of the sheriff, pursuant to 4, 5 W. & M. c. 21; Which statute takes away the reason of this old rule, but not the plaintiff's right to remove him. 1875, 1876.

About quashing indictments, on motion. 1841. See Indictment.

After sentence pronounced, the court are not bound to let in a motion in arrest of judgment. 1901 to 1903.

Bail upon appearing to an outlawry. 1920. See Bail, Outlawry.

The sheriffs of London and Middlesex could not be compelled to return their writs and bring in the body, till after six days; They shall, for the future, be obliged to do it within FOUR days.

Regula generalis, made in Trin. 6 G. 3. 1921.

**Presentation.** See Advowson.

**Presentment.** See Court-Leet.

By a Justice of peace upon view, pursuant to 5 Eliz. c. 13. § 9. is traversable GENERALLY. 1530 to 1532. See High-Way.

Of Bread wanting weight—(grafted on 3 G. 3. c. 11. § 6. and 14.) 1859 to 1865. See Court-Leet.

**Priority of Suit—**

What gives it: And how to be pleaded. 1423 to 1434. See Pleading.

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### Prison, Prisoners.

In execution upon QUI TAM actions brought against them, are *not* included in the 13th clause of 32 G. 2. c. 28. "for discharge of debtors in execution of sums not exceeding 100*l.* upon exhibiting their petition and assigning over all their estate and effects;" either as to the crown's moiety, or even the informer's moiety. Page 1322.

*Insolvent debtors*—when to be brought up, a second time. 1393. See Statutes (particularly 2 G. 2. c. 22. § 9. and 32 G. 2. c. 28. § 13.)

By 2 G. 3. c. 2. so much of 1 G. 3. c. 17. as relates to creditors compelling prisoners charged in execution, to deliver up their estates, and to such prisoners being thereupon discharged, is REPEALED from and after 19th November 1761, to all intents and purposes whatsoever. 1457.

BEFORE that day, an application had been made to the quarter-sessions under the *then unrepealed* law, and the jurisdiction fully attached in them; and every requisite complied with: Yet they adjourned the matter till a day subsequent to that day, when the repeal was to take place. They can not proceed, after that day: No jurisdiction remained in them. *ibid.*

A person *not in actual custody of the gaoler*, but only of the officer in a lock-up house, was holden *not* intitled to be discharged under 1 G. 3. c. 17. 1809.

If a *commititur* is not entered on record within two terms, the prisoner is intitled to be discharged. 1841. See *Practices*.

### Privilege—

Of ambassadours and public ministers, and their domestic servants. 1478 to 1482. See *Ambassadour*.

Of an attorney, does not hold against the court of conscience in London. 1583.

### Prohibition—

Shall not be granted, where it is *not material*. Page 1692. See *Organ*.

The reason why the temporal courts will not permit the spiritual courts try customs. *ibid.*

To the ecclesiastical court, in a suit there, for not setting out tithes. The occupier, who had agreed with the impropiator's agent, after the corn was cut and ready to be housed for 5*l.* tendered the 5*l.* and offered a plea "That he had purchased the tithe for 5*l.*" Which plea the ecclesiastical court rejected.

1st. This rejection of this plea is matter of prohibition, and not of appeal. 1874, 1875.

1. Where their law does not differ from our's the rejection of a plea, would be matter of appeal. *ibid.*

2. But where it does differ; or where they would require greater proof, such a rejection is matter of prohibition, not of appeal; because all their courts would equally adhere to their own law. *ibid.*

2dly. An agreement with the agent of the impropiator, for a composition, binds the principal, by our law, and in common sense and justice: But by their law, it does not bind the proprietor of the tithes, (as Dr. Gibson says.) 1874, 1875.

3dly. The occupier may here, with propriety, be said to have purchased these tithes, though the contract was only by parol: For the corn was severed; and it was not a sale to a stranger, but a composition between the proprietor and occupier, *pro hac vice tantum*. *ibid.*

To the spiritual court—granted (even after affirmance upon appeal) against a decree for a creditor, who had cited an administratrix to bring in an inventory, and (being brought in) had objected



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objected to it. The court held the spiritual court to have no jurisdiction. Page 1922, 1923.

### Promise.

A tenant being three quarters of a year in arrear to his landlord for rent, and insolvent, conveyed all his effects for the benefit of his creditors. His creditors employed one *Leper*, as a broker, to sell these effects. He advertised a sale. The landlord came to distrain. *LEPER* promised to pay him the said arrears amounting to 45 l. (fixing the specific sum,) if he would DESIST from distraining. This is not within the statute of frauds 29 G. 2. c. 3. § 4. which enacts "That no action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of ANOTHER PERSON, unless the agreement or some memorandum or note thereof shall be in writing, and signed by the party or some person authorized by him." 1886 to 1891.

**Promissory Note.** See Bill of Exchange.

A *cash-note* directed by a merchant to his banker—"Pay to *ship Fortune*, "OR BEARER, so much"—is negotiable: And the bearer (proving that he came fairly by it) may maintain an action upon it, against the drawer, 1516 to 1530. See Bill of Exchange, S. C. at large.

### Quare Impedit.

SIX months here means half a year—"If he recovers his presentation within six months, damages shall be given, to half a year's value only." 13 Edw. 1. (*Westm.* 2.) c. 5. 1455.

**Duo Warranto.** See Information in nature of a Quo Warranto.

### Ransom.

AN action may be maintained by an alien enemy upon a ransom-bill. Page 1741, 1742. See Alien.

### Rates.

Lessees of LEAD-mines are not, in that respect, liable to be rated to the relief of the poor. 1341 to 1345. See Mines, Statutes (43 Eliz. c. 2.)

Scavenger's rate being appealed from, to the quarter-sessions, the quarter-sessions not only quashed it, but MADE a new one. 1458 to 1460.

1st. This order of quarter-sessions was removed into B. R. by certiorari, notwithstanding the 12th section of 2 W. & M. stat. 2. c. 8. 1458.

2dly. It was quashed in toto: The justices at their quarter-sessions have no power to make this new rate. 1460.

Poor's rate being appealed from, Qu. Whether the quarter-sessions can make a new one. *ibid.*

### Receit—

To defend pro interesse suo—discussed. 1290 to 1304. See Ejectment.

### Recognizance—

On removing an indictment for perjury from *Hicks's Hall*. The defendant neither gave notice of trial nor went to trial in or after the next term: In the subsequent one, he gave notice of trial, but withdrew his record. The prosecutor got costs taxed against him, for not going on to trial according to his notice; and had him in custody upon an attachment for a contempt in non-payment of them. The defendant gave a second notice of trial, and was acquitted. The BAIL applied to discharge the recognizance. The

## A Table of the Principal Matters.

The court *refused to discharge it*, whilst these costs remained *unpaid*: For there is no pretence to apply for a *favour*, without first doing justice. Page 1461 to 1463.

**Recovery.** See *Common Recovery*.

**Relation.** See *Fiction, Teste, Pleading, Declaration*.

Of a *declaration*, to the first day of the term, if it has no special memorandum, is only *fiction*, and may be controverted. 1243. For *fiction*s of law shall not be urged to an intent not within the reason and policy of them. *ibid.*

Of a *judgment*—To *what day* it shall relate. 1596, 1597. See *Common Recovery*.

### Release.

Lease and release by an *infant*, is only *voidable*. 1794 to 1809. See *Infant*.

**Rent.** See *Landlord, Replevin*.

*What things* belonging to *third persons* are *liable to be distrained* for rent: And *what* are *exempted*: 1498 to 1504. See *Distress*.

**Repeal.** See *Statutes*.

**Replevin.** See *Distress*.

Is not an *action* or *plaint* within 8, 9 *W. 3. c. 11. § 1.* 1286, 1287.

### Respondentia—

How *respondentia-interests* are to be *insured*. 1401. See *Policy of Insurance*.

### Return—

Falling on a *sunday*. 1595 to 1602. See *Common Recovery*.

Signed and delivered, but *not FILED* till about two years *after the death* of the person to whom the writ was directed. It was moved "to *take it off from the file*." This was litigated; but at last compromised. Page 1641 to 1645. See *Mandamus*.

The *sheriffs of London and Middlesex* shall be obliged to return their writs and bring in the body, within four days: *Regula generalis, Trin. 6 G. 3.* 1921. (Before this rule, they could not be compelled to do it, till after six days. *ibid.*)

### Revocation—

Of a *will*—A *covenant "to stand seised "to uses"*—is not a revocation. 1256.

But a *feoffment without livery*, a *bargain and sale without enrolment*, a *grant without attornment*, are *revocations*. *ibid.* So, if a man parts with the estate out of himself. *ibid.*

A *revocation in equity* must be upon the foot of its being carried into execution in equity. *ibid.*

Of a *will*—A *partition, by deed*, between tenants in common, does not amount to a revocation. 1491.

*Constructive revocations*, contrary to the intention of the testator, ought not to be indulged. *ibid.*

### Riot—

Can not be by fewer than *three*. 1263. If several be indicted; and *all acquitted*, but *two*; there can be *no judgment* against those two. *ibid.*

But if six be indicted; and two die, *untried*; two are acquitted; and two found guilty; judgment shall not be arrested. *ibid.*

So, if the indictment be "That the "two persons convicted, *cum multis* "aliis, or *with divers other disturbers* "of the peace, committed a riot." *ibid.*

**Roads.** See *Highways*.



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**Scabenger.** See *Rates*.

### Scire facias—

**AGAINST** bail—must lie four days in the office, before the return. Page 1723.

In error—needs not do so. *ibid*.

No damages can be recovered on a *scire facias*: Nor could costs, till 8, 9 *W*. 3. c. 11. § 3. 1791, 1792.

### Scotland.

The linen manufacture of Scotland is the linen manufacture of *this kingdom*, within the act of 9, 10 *W*. 3. c. 27. and the act of union: And a wholesale-dealer in linens of the manufacture of Scotland is not obliged to take out a licence, to qualify him to trade thus by wholesale in *ENGLAND*. 1317.

### Secretary of State—

“Whether he is a justice of peace, within the intention of 7 *J*. 1. c. 5. 21 *J*. “1. c. 12. and 24 *G*. 2. c. 44.”—argued and discussed, but not settled. 1741 to 1768.

“Whether he acts as a conservator of the peace by the common law”—argued, but not settled. *ibid*.

He can not issue a warrant “to take up the author, printer, or publisher” (of a seditious libel,) generally, and without naming or describing any particular person; leaving it, consequently, to the discretion of the messenger, “whom to apprehend.” *ibid*.

The officer who defends himself under such a warrant is obliged to shew that he acted in obedience to it. 1767, 1768.

If he takes up a person who was not author, printer, or publisher, the foundation of his defence fails. *ibid*.

### Sentence—on Criminals

On a man convicted of bribery at an election to parliament—(See *Bribery*).

1st. Was respited till the time li-

mitted for bringing the *qui tam* action should expire. Page 1359, 1388.

2dly. Sentence—200 *l*. fine, and three months imprisonment. 1389.

For perjury, against Mr. Lookup—He assigned for error (*inter alia*) 3d. That no certain day is fixed for setting him in the pillory. 4th. That no certain time is fixed for his transportation. 6th. That the court had no power to order him to be transported to the colonies or plantations, by 2 *G*. 2. c. 25. 1903. [The judgment was reversed for another different error.]

After sentence pronounced, the defendant can not move in arrest of judgment, or for a new trial. 1902, 1903.

### Sheriffs and their Bailiffs—

How far their bailiffs are confined as to the execution of their warrants. 1725 to 1729.

1st. Whether it must be within their particular hundred. *ibid*.

2dly. The proper method of pleading, upon actions brought on their security-bond. *ibid*.

**Sheriff Turns.** See *Court-Lect*.

### Silks and Velvets.

The proceeding by the custom-house officer, for the pecuniary penalty forfeited by 26 *G*. 2. c. 2. § 3. 6. is not limited, by § 7. to a month from seizure: It extends after condemnation, where due diligence is used by him. 1358, 1359.

Special bail, by the 8th section of that act, shall be given “to pay the forfeitures, or yield the body:” And the affidavit to hold to bail needs not to be more particular than “that the plaintiff has cause of action against the defendant, for such a sum, forfeited by him so and so, &c.” 1569.

## A Table of the Principal Matters.

### Stamps.

A lease can not be given in evidence, without being stampd. Page 1563.

### Statutes. See Construction.

- 2 G. 2. c. 24 (§ 7.) "for the more effectual preventing bribery and corruption in the election of members to serve in parliament." 1236, 1237. See *Bribery, Declaration*.
- 29 C. 2. c. 3. § 4. requiring a note IN WRITING, where the agreement is NOT to be performed within a year—does not extend to CONTINGENCIES that only may happen within the year: A note in writing is not necessary, unless it appears upon the agreement, that it is to be performed AFTER the year. 1281.
- 22, 23 C. 2. c. 9. § ult. (concerning costs, where the damages are under 40s.) 1282 to 1284. See *Costs*.
- 8, 9 W. 3. c. 11. § 1. *Replevin* is not within it. 1286, 1287.
- All statutes relating to costs are to be construed strictly. *ibid*.
- 8, 9 W. 3. c. 27 } 1287 to 1290. See  
27 G. 2. c. 17 } *Marshal, Land-*  
33 G. 2. c. 1 } *Tax*.
- 13 E. 1. c. 3. } 1290 to 1304. See  
11 G. 2. c. 19. } *Ejectment, Receipt*.
- 9, 10 W. 3. c. 27 } The linen-manufacture of SCOTLAND is the linen manufacture of THIS kingdom. 1317. See *Hawkers, Pedlars, and Petty Chapmen*: See *Scotland*.
- 5 Ann. c. 8 }
- 32 G. 2. c. 28. § 13. Defendants in QUI TAM actions are not within this clause; so as to be intitled to be discharged even as to the informer's moiety, upon assigning over their estate and effects. 1322.
- 2 G. 2. c. 24. § 7. and § 11. 1335 to 1340. See *Bribery*, (*V. supra*, under pa. 1236.)
- 43 Eliz. c. 2. does not extend to lead-mines. The specifying coal-mines

excludes other sorts of mines. Page 1341 to 1345. See *Poor-tax, Mines*.

26 G. 2. c. 21. § 3, 6, 7. 1358, 1359. See *Silks and Velvets*.

An ORIGINAL order "For late overseers to pay over monies to their successors," can not be made by the QUARTER-SESSIONS. 1366, 1367. See *Justices of peace, Overseers*.

4, 5 Ann. c. 16. § 13. See *Payment of Money into Court, on it*. 1370 to 1375.

32 G. 2. c. 28. § 13. leaves the time of bringing remanded prisoners up again, to the discretion of the court: Whereas 2 G. 2. c. 22. § 9. fixed it to some time within the first week of the following term. 1393.

19 G. 2. c. 37. § 5, 6. 1394 to 1401. See *Policy of Insurance*.

22 C. 2. c. 11. § 21. 1408 to 1416. See *Wharfage*.

5 G. 2. c. 30. § 23. to prevent malicious suing out commissions of bankruptcy. 1418, 1419. See *Bankrupt*.

2 G. 2. c. 24. § 7. (against corrupting voters for members of parliament.) 1423 to 1434. See *Priority of Suit; and Pleading*.

4, 5 W. & M. c. 21. § 2. 1448 to 1450. See *Bail, Practice*.

11 G. 1. c. 4. § 3. 1452 to 1455. See *Mandamus*.

13 Edw. 1. (*Westm. 2.*) c. 5. 1455. See *Quare Impedit*.

2 G. 3. c. 2. repealing part of 1 G. 3. c. 17. after 19th Nov. 1761. 1457. See *Prisoners*.

2 W. & M. stat. 2. c. 8. § 12. 1458 to 1460. See *Rates (Scavenger's), Certiorari*.

9, 10 W. 3. c. 27. § 1. There is a mistake in this act: The words do not answer the intention of it. 1472 to 1474. See *Hawkers and Pedlars*.

9, 10 W. 3. c. 27. § 8. Conviction for trading without having a licence is



## A Table of the Principal Matters.

- is good; though the evidence was only of a refusal to produce. Page 1746. See, as last above.
- 7 *Ann. c. 12.* The History and particular occasion of its being made; and the privileges secured by it. 1478 to 1481. See *Ambassador*.
- 4, 5 *W. & M. c.* }  
 18. § 5. }  
 12 *G. 1. c. 29.* } 1482 to 1484. See  
 13 *C. 2. stat. 2.* } *Capias utlagatum,*  
*c. 2. § 4.* } and *Bail*.  
 5 *G. 2. c. 22. §*  
 5. }
- 32 *H. 8. c. 1. § 1* }  
 34, 35 *H. 8. c. 5.* } Of wills — dis-  
 § 4 } cussed and ex-  
 } plained; parti-  
 } cularly, with  
 } respect to wills  
 } made by joint-  
 } tenants. 1489  
 } to 1498. See  
 } *Joint-tenants*.
- 21 *H. 8. c. 13. § 9, 10.* against plu-  
 ralities. 1504 to 1511. See *Bene-  
 fice, Induction, Lapse*.
- 5 *Elix. c. 13. § 9.* 1530 to 1532.  
 See *Highway, Presentment*.
- 5 *Jac. 1. c. 8.* } 1545 to 1549.  
 13 *C. 2. stat. 2. c. 2.* } See *Bail, Er-*  
 16, 17 *C. 2. c. 8.* } ror.
- 26 *G. 2. c. 21. § 3 & § 8.* 1569.  
 See *Silks and Velvets, Bail, Affida-  
 vit*.
- 2 *G. 2. c. 24. § 7.* (against corrupting  
 voters for members of parliament.)  
 1586 to 1591. *V. supra* (under pa.  
 1423.) and *Bribery, Evidence*.
- 4 *G. 2. c. 28. § 1* } 1603 to 1609.  
 11 *G. 2. c. 19. § 18* } See *Landlord*  
 } and *Tenant*.
- 13, 14 *C. 2. c. 12. § 21.* 1610 to  
 1615. See *Parish, Township, Village,  
 Overseer*.
- 4, 5 *W. & M. c. 18.* } relate to different  
 § 2 } objects: The  
 9 *Ann. c. 20. § 4* } former restrains;  
 } the latter en-  
 } larges. 1615,  
 } 1616. See *In-*  
 } formations in  
 } nature of *Quo*  
 } *Warranto*.
- 4, 5 *Ann. c. 16. § 11.* Dilatory pleas.  
 to indictments must have *affidavits* an-
- nexed to them, verifying their truth,  
 Page 1618.
- 17 *G. 2. c. 5. § 7.* (relating to rogues  
 and vagabonds) 1636. See *Commit-*  
*ment*.
- 7 *Ann. c. 12.* The service must be  
*real and bona fide*; Otherwise, the  
 domestic can not have the privilege.  
 1481, 1677 to 1679. See *Ambassa-*  
*dour*.
- 18 *Elix. c. 3.* } 1679 to 1682. See  
 6 *G. 1. c. 19. § 2* } *Bastard, Orders of*  
 } *Bastardy, Commit-*  
 } *ment*.
- 5 *Ann. c. 14. § 2.* (for the better pre-  
 servation of the game.) 1720 to  
 1723. See *Certiorari, Conviction,*  
*Costs*.
- 23 *H. 8. c. 15. § 1* }  
 18 *Elix. c. 5. § 3* } 1724. See *Costs*.  
 4 *Jac. 1. c. 3. § 1* }  
 9 *G. 1. c. 22. § 7.* *ibid.* See *Hun-*  
*dred*.
- 7 *Jac. 1. c. 5* } Whether a *secretary*  
 21 *Jac. 1. c. 12* } of state is within  
 24 *G. 2. c. 24* } the intention of  
 } them. 1742 to  
 } 1768. See *Se-*  
 } *cretary of State*.
- 1 *Elix. c. 17.* 1770, 1771. See *Wa-*  
*ter-Bailiff*.
- 1 *G. 3. c. 17. § 1.* 1809. See *Prison,*  
*Prisoners*.
- 4, 5 *W. & M. c. 18* } 1812 to 1823.  
 9 *Ann. c. 20* } See *Fairs, Mar-*  
 } *ket, Information*  
 } in nature of *qua*  
 } *warranto*.
- 11 *G. 1. c. 24.* did not consider corpo-  
 rations that had slipt the fixed day  
 of electing their chief officer, as be-  
 ing thereby dissolved; It only meant  
 to revive their activity. 1872, 1873,  
 See *Corporation*.
- 4, 5 *W. & M. c. 21.* takes away the  
 reason of an old rule of *Michaelsmas*  
 1654, but not the plaintiff's right  
 to remove a defendant by *habeas cor-*  
*pus*. 1876. See *Practice*.
- 29 *C. 2. c. 3. § 4.* (Of frauds.) What  
 shall or shall not be considered as a  
 special promise to answer for the debt  
 of another person. 1886 to 1891.  
 See *Promise*.
- 2 G.

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§ G. 2. c. 35. Page 1903. See Sentence for Perjury.

§ 1 Eliz. c. 3. § 3. } 1920. See Out-  
4, 5 W. & M. c. 18. } lawry, Bail.  
§ 4.

§ 9 G. 2. c. 3. § 4. (Of frauds.) An Auction seems not to be within it. 1921. See Auction.

§ 1 H. 8. c. 5. § 4. (concerning inventories.) 1923. See Prohibition.

§ 3 Edw. 1. (Westm. 2.) c. 13. } Concerning leets, turns, inquisitions, presentments: The power of which turns and leets has been gradually abridged; never enlarged. 1859 to 1865. See Court-Leet.  
§ 1 Edw. 2. Stat. 2. c. 17  
Magna Charta, c. 17

§ 1 H. 3. Assise Panis & Cervisie } discussed and explained. *ibid.*  
8 Ann. c. 18 } See Bread, Court-Leet.  
§ 1 G. 2. c. 29  
§ 3 G. 3. c. 11

### Subpoena—

An attorney is not obliged to obey a subpoena with a *duces tecum* of papers belonging to his client, served upon him to found a prosecution by indictment—against his client for forging them. 1688.

### Summons—

The want of it may be supplied by appearance and not asking further time. 1786. See Conviction.

### Sunday—

Is not a juridical day: And when a return falls upon a Sunday, no appearance, nor judgment can be till Monday. 1596 to 1602. See Common Recovery.

### Surrender—

By an infant, by deed—whether void, or only voidable. Page 1807. See Infant.

### Tenant. See Landlord.

Tenant in Tail. See Common Recovery.

JOHN Shilson, tenant in tail, with remainder to his own right heirs, by lease and release conveyed to trustees, to the use of himself for life; remainder to trustees, to preserve contingent remainders; remainder to the use of his then intended wife, for her life; remainder to their first and other sons, in tail male: They married, and had a son. Afterwards, the said John suffered a common recovery; and declared the uses of it to a trustee, in fee; In trust, to sell. He sold to Tyrrell. Tyrrell brought an ejectment against the son. PER CURE, unanimously—The recovery enured to the uses of the settlement: And the purchaser (Tyrrell) had no title. 1703 to 1706.

1st. The old notion was, "that a tenant in tail could not convey an estate longer than for his own life." Or, at least, it was doubted whether he could do it otherwise than by a feoffment. 1705, 1706.

2dly. But it is now settled "that he may, by lease and release, or by bargain and sale, pass a base fee, a defeasible estate, to the bargainee or releasee, voidable by the issue in tail." *ibid.*

### Thames—

Conservancy of it. 1768 to 1771. See Water-Bailiff.



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### Timber.

*Beech* may be so, by the custom of that part of the country where it grows. Page 1309, 1312. See *Beech*.

### Tithes—

By customary tenants. 1728. See *Customary Tenants*.

Of a part of a common, allotted (upon an inclosure and division) to be holden by the persons to whom they are allotted, subject to the same charges and incumbrances as their own former lands to which they are consolidated, were subject. *Per Cur.* An exemption and modus which did not extend to common, exempting their own former lands from tithes, shall not exempt the allotted common from tithes; And what was not before exempted, shall pay tithes; though what was before exempted, shall remain exempted, after the allotment and consolidation. 1375 to 1379.

Lie in grant: Yet, where severed, and compounded for by the occupier, *pro hoc vice tantum*, may properly be said to be purchased by him, though the contract was only by PAROL. 1873 to 1875. See *Prohibition*.

NOTICE of setting them out is not, by common law, necessary to be given by the occupier to the owner: But by the ecclesiastical law, it is necessary. 1192.

A custom in a parish, "That notice of the setting them out should be given to the owner," is a reasonable, convenient, and good custom. 1894. And a very slight evidence would be sufficient to prove it. *ibid.*

But notice "of their having been set out" is necessary to be given to the owner, previously to the bringing an action against him for not taking them away. 1892.

The action for not taking them away in a reasonable time, must be trespass on the case: Trespass *vi et armis* will

not lie; because it is only a non-feasance. Page 1891.

Toll. See *Wharfage*.

Toll-thorough requires a consideration to be shown, to support the demand of it; because it is against common right. 1404, 1407. But

A PORT-duty does, of itself, imply a consideration, to support. 1404, 1407.

Township. See *Parish*.

What shall be esteemed a township or village. 1391 to 1393. See *Village*, *Mandamus*.

### Trade and Trader.

Feme Covert SOLE trader in London. 1776 to 1785. See *Bankrupt*, London.

### Trespass.

The distinction between trespass *vi et armis*, and trespass upon the case. 1556 to 1564. See *Action*.

Wherever there is an exclusive right, trespass *vi et armis* will lie. 1827. See *Action*.

### Trial—

By a jury of ANOTHER county—

1st. Local actions or informations may be tried in the next adjoining county; IF the matter can not be tried at all, or can not be fairly and impartially in the proper county. 1330 to 1335.

2dly. This may be done in the method of entering a suggestion upon the roll, by leave of the court. *ibid.*

3dly. But there must be FACTS suggested upon the roll, sufficient to warrant the conclusion, and to prove fully and clearly to the court,

## A Table of the Principal Matters.

court, "that a fair and impartial trial can not be had in the county where the fact is laid." Page 1330 to 1335. A general swearing "to apprehension and belief," is far from being a foundation for such a suggestion. *ibid.*

4thly. Neither is freedom of the city a sufficient reason for it, or a ground to award the venire to the county at large, for the trial of an information against aldermen of the city for a misdemeanour in refusing to admit persons to their freedom, till after the election for members of parliament: For, it does not follow, that because a person espouses one or another interest at an election, he must therefore justify or defend at all, and much less by perjurying himself, the improper behaviour of the friends or agents of the candidate he voted for. *ibid.*

Shall not be put off, where the putting it off would not tend to advance justice, but to delay it. 1516.

1st. A trial shall shall not be so hurried on, as to do injustice to the defendant. 1514.

2dly. An affidavit in common form may be sufficient to put off a trial, where no cause of suspicion appears: But where there is cause of suspicion, it may, in some cases, be necessary to satisfy the court—

1. That the persons absent are really material witnesses. *ibid.*

2. That there has been no laches, or neglect to procure their testimony. *ibid.*

3. That there is a reasonable expectation of their future attendance. 1515.

### Trover.

The distinction about bringing into court or delivering to the plaintiff, the specific thing demanded: *viz.* In what cases it may be done; in what cases it may not. 1364. See *Practice*.

### Trustees.

Shall not, in an ejectment, recover possession from or dispute it with their cestuy qui trust. Page 1901.

**Turn.** See *Court-Less*.

### Venue.

**T**HERE is great difference between changing the venue, and awarding the venire into another county. 1333.

The court ought to change the venue, when it appears to them, that there is a probable ground to apprehend, that a fair, impartial, or at least a satisfactory trial, can not be had where it is laid. 1564.

May be changed into the county of Chester. 1859.

### Verdict.

Where no injustice is done, it is a reason against setting it aside. 1255, 1256.

A consent "to be bound by a verdict in one cause out of several upon the same question," means such a verdict as the court shall think ought to stand. 1477.

Excessive damages were given on a writ of inquiry, for a militia-man against his colonel, who had ordered him 20 lashes by two drummers: But the court would not set aside the verdict, because the colonel had acted arbitrarily, *malò animo*, and was very well able to pay them. 1846.

**Village.** See *Parish, Township*.

An order was quashed: which appointed overseers for the township or village of Haugh, consisting of a capital messuage, two small ancient cottages, one small cottage lately built, and a tenement, part of the capital messuage:



## A Table of the Principal Matters.

All let to **ONE** man; and the three cottages and tenement inhabited by his poor under-tenants, (two day-labourers, a shepherd, and a poor widow.) Page 1392, 1393.

### Arbitrage—

Is not vitiated, by the arbitrator's joining in it. 1474.

### University of Cambridge—

|                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------|
| <p>Their mode of electing a high-steward.<br/>         Their right to a court-leet.<br/>         Their partial or total acceptance of a new charter.<br/>         Their manner of voting; and proper place for it.<br/>         The commencement of their degrees.<br/>         The difference between honorary and regular graduates.<br/>         Their usages and ancient rights.<br/>         Their being lay-corporations.</p> | <p>1648<br/>to<br/>1663.<br/>See<br/>Mandamus.</p> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------|

### Void, Voidable.

Infant's conveyance by lease and release, is only voidable. 1794 to 1809. See *Infant*.

### Usage.

No antiquity can give sanction to an usage bad in itself. 1767.  
 Usage ought not to weigh against principles and clear law; unless in cases where the contrary would be inconvenient and induce worse effects. *ibid*.

### Wages—

**O**F Mariners. See *Mariners*.

### Warrants—

General—are illegal. 1767. See *Secretary of State*.

By Secretary of State. Page 1742 to 1768. See *Secretary of State*.

### Warrant of Attorney—

To confess a judgment—given to a *feme sole*, who afterwards marries—How judgment must be entered up. 1471. See *Baron and Feme*.

To confess a judgment—The necessity of an attorney for the defendant is confined to the particular cause whereupon he is in custody: The rule does not extend to warrants to confess judgments in other actions. 1793.

### Water-Bailiff—

Of the river *Thames*, between the great bridge of *Staints* and the head of the river, is an office in the gift of the crown. 1768.

He has no right to seize the engines or fish in a person's own fishery, as prohibited by 1 *Eliz. c. 17*. without previous presentment or conviction. 1770, 1771.

The violation of this public law (of 1 *Eliz. c. 17*.) is not within the idea of a nuisance: The method prescribed by it, must be pursued. *ibid*.

### Wharfage.

Wharfage is due for landing goods on the wharf: *Cranage*, for the assistance of the crane. 1414.

The rates for wharfage and cranage in London are settled by 22 *G. 2. c. 11*. § 21, 1408.

The council could not vary or extend that act; but were obliged to pursue it: It was not in their power, to impose a duty. 1415, 1416.

Wharfage and cranage are not due for goods not landed upon such wharf; although they are brought to it; and the vessel fastened to it, whilst they are put out of it, on board a lighter. 1413 to 1416.

The wharfinger can not hinder the vessel from coming to his wharf. 1413 to 1416.

But *all*

## A Table of the Principal Matters.

But if it comes under a colourable pretence, with ill intention; or moors or fastens to it without intention of loading or unloading upon it; or stays longer than is necessary to load and unload; the wharfinger has his remedy by action on the case. Page 1413 to 1416.

### Will,

Revocation of it. See *Revocation*.

The statutes of wills (32 H. 8. c. 1. § 1. and 34. 35 H. 8. c. 5. § 4.) discussed and explained; and particularly, with respect to wills made by joint-tenants. 1489 to 1498. See *Joint-tenants*.

Witnesses to a will.

1st. It is not necessary that they should attest in the presence of each other. 1775.

2dly. Nor, to every page, folio, or sheet, *ibid*.

3dly. Nor, that each page, folio, or sheet should be particularly shewn to them. *ibid*.

4thly. Nor, that the testator should declare the instrument he executes to be his will." *ibid*.

5thly. Nor, that the witnesses should know the contents. Page 1775.

6thly. But it may be material, whether the first sheet was or was not in the room, when the latter sheet was executed and attested, 1775.

### Witnesses—

To a will, See *Will, Devise*,

### Words—

"Thou art a rogue; and thou hast cheated me of several pounds"—are actionable. 1688, 1689.

### Writing—

What sort of agreements must be reduced into writing, or some memorandum or note thereof made and signed. 1280. See *Statutes* (29 C. 2. c. 3. § 4.)

F I N I S.



REPORT OF THE BOARD OF DIRECTORS

The Board of Directors of the  
Company has the honor to acknowledge  
the receipt of the report of the  
auditors, dated the 1st day of  
January, 1900, and in reply to  
state that the same has been  
carefully examined and found  
correct.

The Board of Directors of the  
Company has the honor to acknowledge  
the receipt of the report of the  
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carefully examined and found  
correct.

Yours truly,  
J. H. HARRIS

